United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
District of Columbia Circuit

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Joseph W. Stewart
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No. 14,307

IDA H. ECKE,

Appellant,

v.

DISTRICT UNEMPLOYMENT COMPENSATION BOARD

and

AEM, INC.,

368

Appellees.

APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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INDEX

		Page
A.	JURISDICTIONAL STATEMENT	1
B.	STATEMENT OF CASE	2
C.	DECISIONS BELOW	3
D.	STATUTES AND REGULATIONS INVOLVED	4
E.	STATEMENT OF POINTS	4
F.	SUMMARY OF ARGUMENT	5
	The Reasonable and Prudent Man Test	5
	Suitability of Work	6
	The Test of Section 10 (d) of the Act	6
	The Precedents Relied on By the Board	9
G.	ARGUMENT	10
	I. By the Board's Controlling Test of Reasonableness Appellant Acted With Good Cause	10
	II. The Board Erroneously Failed to Consider the Factors Prescribed by Section 10 (c) of the Act	12
	III. Section 10(d) of the Act Barred Disqualification of Appellant	17
	(a) The Scheme of the Act	18
	(b) Under the Test of Section 10(d)(3) of the Act Appellant Could Not Properly be Disqualified	19
	(c) The Legislative History	20
	(d) Legislative Purposes Must Prevail Over Literalism	22
	IV. The Board Relied on Precedents that are Neither Controlling Nor Persuasive	24
	(a) The Chambers case	24
	(b) The Barclay case	26
	(c) The Bigger case	27
H.	CONCLUSION	29

AUTHORITIES

Cases:

Apfel v. Mellon, 1929, 59 App. D.C. 94, 33 F. 2d 805	21
Barclay-White Co. v. Unemployment Comp. Bd. of Rev., 356 Pa. 43, 50 A. 2d 336 (1947); cert. denied, 332 U.S. 761	24, 26
Bigger v. Unemployment Comp. Comm., 43 Del. 553, 53 A. 2d 761 (1947)	24, 27
Cabell v. Markham, 148 F. 2d 737, 739 (2d Cir., 1945)	23
Chambers v. Owens-Ames Kimball Co., 146 O.S. 559, 67 N.E. 2d 439 (1946)	9, 24, 25, 26, 27
Holy Trinity Church v. United States, 143 U.S. 457, 459, 12 S. Ct. 511, 512, 36 L. Ed. 226	23
In Re Imogene R. Miller, 243 N.C. 509, 9 S.E. 2d 241 (1956)	26
Maeztu v. Brownell, 132 F. Supp. 751, 752-753 (D.C. 1955)	9, 24
Marks v. United States, 1895, 161 U.S. 297, 16 S. Ct. 476, 40 L. Ed. 706	21
Swenson v. Michigan Employment Security Commission, 330 Mich. 430, 65 N.W. 2d 709 (1954)	16, 22
Tary v. Board of Review, Bureau of Employment Compensation, 161 O.S. 251, 119 N.E. 2d 56 (1956)	9, 26
[illegible]	[illegible]

INDEX (Continued)

Page

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Warrin China & Glass Co., Inc. v. Pedrick, 88 F. Supp. 128 (S.D. N.Y. 1949) . . 8, 21

Statutes and Regulations

District of Columbia Unemployment Compensation Act, August 28, 1935, Ch. 794, 49 Stat. 956; Title 46, Sec. 312, District of Columbia Code:

Section 10(a) 10, 18
Section 10(c) 6, 10, 13, 18, 19
Section 10(d) 6, 8, 10, 12, 13, 17, 18, 19
Section 10(d)(3) 3, 4, 8, 12, 16, 17, 18, 19, 20, 22, 27, 29

Other Authorities

Refusal of Suitable Work, 55 Yale L.J. 134, 143-144 (1945) 17, 28

STATEMENT OF QUESTION

The questions presented are

(a) Whether a union employee is deemed to have voluntarily left work without good cause, within the meaning of the District Unemployment Compensation Act, when the reason for her leaving was that her employer had changed from a union to a non-union shop;

(b) Whether such union employee refused without good cause to accept suitable work, within the meaning of the District Unemployment Compensation Act, when the reason for her refusal was that the employer was a non-union employer; and

(c) Whether such union employee would have been required, within the meaning of the District Unemployment Compensation Act, to resign from a bona fide labor organization as a condition of remaining employed or becoming re-employed with an employer after it had changed from a union to a non-union shop.

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BRIEF FOR APPELLANT

A. JURISDICTIONAL STATEMENT

Ida H. Ecke (hereinafter referred to as "Appellant"), sought review in the United States District Court for the District of Columbia of a decision, dated January 31, 1956, of the District Unemployment Compensation Board of the District of Columbia (hereinafter referred to as "the Board"), which disqualified her from receiving unemployment compensation benefits for the period from June 12, 1955, through July 16, 1955, and reduced her maximum entitlement to benefits by the sum of $150.00. One Board member dissented from this decision. On November 13, 1957, District Judge McGuire, without opinion, made an order denying Appellant's motion for summary judgment and granting the Board's motion for summary judgment. The order below also denied the motion for summary judgment of the employer, AEM,

Inc., t/a S. Groome Eareckson (hereinafter referred to as "the employer"). Appellant now appeals from so much of the order below as denied her motion for summary judgment and granted the Board's motion for summary judgment. Jurisdiction of this Court and of the District Court is based on sec. 12 of the District of Columbia Unemployment Compensation Act, August 28, 1935, Ch. 794, 49 Stat. 956; Title 46, sec. 312, District of Columbia Code.

B. STATEMENT OF CASE

Appellant, long a member in good standing of the carpenters' union (J. App. 16, 19, 23), was employed by the employer who maintained a union shop (J. App. 19). Appellant was one of two seamstresses in the employ of the employer. Because of a lack of work, the employer needed only one seamstress and decided to keep a Miss Snyder "because she could drive the truck". Appellant was therefore discharged on or about May 30, 1955, (J. App. 49, 19, 20). She promptly filed a claim for unemployment insurance benefits on June 9, 1955 (J. App. 26). This was the first application for unemployment benefits she had ever made (J. App. 37). Appellant was then recalled to work for a few days because Miss Snyder had become ill (J. App. 19). Appellant stated that she regarded her recall as temporary, for the duration of Miss Snyder's disability, and that she "went in never thinking I was not going to be laid off" (J. App. 20). Accordingly, she did not withdraw her application for unemployment benefits, although she did report her earnings for the period of her recall (J. App. 27).

The Board, however, found that, having been laid off, she was recalled and thereafter quit her job because her employer changed from a union to a non-union shop (J. App. 49, 50). That finding was implicitly affirmed by the decision of Judge McGuire and is not sought to be reviewed here.

Accepting the propriety of that finding for the purpose of this

appeal, the question is whether Appellant quit her job for good cause or failed, without good cause, to accept suitable employment. As to this issue the relevant facts are as follows:

After Appellant was recalled to work, the employer told her that he was changing to a non-union shop (J. App. 16, 17, 19, 23, 49). As the employer stated, "we had a change of policy which necessitated the employment of persons not in the union" (J. App. 16).

Had Appellant continued to work for the employer she would have been subjected to fine by, and suspension or expulsion from, her union and loss of union benefits (J. App. 24, 47). Moreover, the employer's rate of pay was $1.67 per hour as against the union scale of $1.75 per hour (J. App. 25, 26). (It should be noted that such union benefits also include, among other things, participation in the union health and welfare fund program which provides extensive indemnity payments for medical, surgical and hospital expenses, disability payments and life insurance benefits for union members employed by union employers who are required, pursuant to their collective bargaining agreements with the union, to make payments--in addition to wages--into the said health and welfare fund for the benefit of their union employees. Upon ceasing to be a "union employer", the employer in this case no longer paid wages at the union scale nor did it make payments into the health and welfare fund for the benefit of its employees.)

C. DECISIONS BELOW

The Appeals Examiner, on October 18, 1955, held that Appellant had quit her job but with good cause within the meaning of sec. 10(d)(3) of the District of Columbia Unemployment Compensation Act (hereinafter referred to as the "Act"), 46 D. C. Code, sec. 310(d)(3)[1], since

1 "Benefits shall not be denied .... (3) if as a condition of being employed the individual would be required .... to resign from .... any bona fide labor organization."

to have worked in a non-union shop would in effect have resulted in termination of her union membership (J. App. 49). By decision dated January 31, 1951, the Board reversed the Appeals Examiner and held that section 10(d)(3) referred "only to conditions established by the employer". Appellant was consequently disqualified from receiving benefits from June 12 through July 16, 1955, and her maximum entitlement to benefits was reduced by the sum of $150.00 (J. App. 50, 51). Board member Preller dissented on the ground that "Congress did not intend section 10(d)(3) of the Act to apply only to conditions set out by the employer but also intended . . . it to apply whenever accepting a job or continuing on a job would in effect cause the loss of union status". (J. App. 51).

On November 13, 1957, District Judge McGuire, without opinion, affirmed the decision of the Board by granting the Board's motion for summary judgment and denying Appellant's motion for summary judgment.

D. STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are set out in Supplement I to this Brief.

E. STATEMENT OF POINTS

The failure of the Court below to write an opinion makes it appropriate to assume that the reasoning of the Board was adopted by the Court.

The Board improperly reduced the unemployment benefits to which Appellant was entitled. It erred (a) in ignoring its own regulations and applicable provisions of the Act which made such reduction improper, and in deciding the case solely under section 10(d)(3) of the Act, and (b) in giving that section an excessively literal reading which thwarted its purpose.

These errors are discussed at greater length in the Summary of

Argument and Argument, infra.

F. SUMMARY OF ARGUMENT

Under section 10 of the Act a claimant may be denied benefits for quitting a job or failing to accept work only if he does so without good cause. The Act, however, does not specify what is not good cause. It leaves this to the determination of the Board "under regulations prescribed by it". But section 10 contains provisions for the protection of a claimant. Paragraph (c) lists several factors to be considered in determining suitability of employment and paragraph (d) prohibits disqualification in a number of designated situations. Under these, Appellant's disqualification was improper. But even if Appellant did not come within these provisions, the Board could have and should have found that Appellant acted with good cause under other provisions of section 10 and the Board's regulations and should not have been disqualified.

THE REASONABLE AND PRUDENT MAN TEST

These regulations, apart from stating that what is good cause will "depend upon the facts in each case and are not confined to causes connected solely with the employment itself" (Regulation III, A), lay down only one test for determining good cause:

> "The test will be--what would the reasonable and prudent individual in the labor market do in like circumstances." (ibid)

Since Appellant is a union member, the test, to be at all meaningful in her case, must be what would the reasonable and prudent union member do in like circumstances. To the union member, employment in a non-union shop involves risk of expulsion from the union and loss of valuable union benefits and an investment of time, effort and money in the union. To many union members it also involves violation of an important principle. None of these considerations affects the person without union affiliation. If he accepts work in a non-union shop he risks nothing and sacrifices nothing. To test the conduct of a union member by

the standard of one who is not a union member must give distorted rather than sound results.

There is no doubt as to what the reasonable and prudent union member would do in Appellant's circumstances. He would not risk his union membership and benefits and violate his principles without first making an effort to find work in a union shop. For a union member to refuse the first job offered or quit present employment because it is or has become non-union is not unreasonable. Appellant therefore should have been held to have acted with good cause.

SUITABILITY OF WORK

Section 10(c) of the Act provides that in determining suitability of of work the Board shall consider "(1) the physical fitness and prior training, experience and earnings of the individual, . . . (3) the risk involved as to health, safety, or morals".

The Board failed to consider Appellant's experience as a union member, accustomed to work under union conditions and at union wages and the employer's less than union scale of wages or its failure to continue to pay other union benefits. Nor did the Board consider, under the moral risk provision of section 10(c)(3), that Appellant would have violated her deeply-felt principles by working in a non-union shop. Under these provisions, the work became unsuitable for Appellant when the employer changed to a non-union shop.

THE TEST OF SECTION 10(d) OF THE ACT

Section 10(d) of the Act provides in relevant part:

> Benefits shall not be denied to any otherwise eligible individual for refusing to accept any work under any of the following conditions: . . . (2) if the wages, earnings, hours, or other conditions of the work offered are less favorable to the individual than those prevailing for similar work in the locality; (3) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization.

The Board erred, as noted above, in deciding the case solely under Clause (3), in ignoring Clause (2), the other applicable provisions of section 10 and in ignoring its own regulations. It compounded the error by giving Clause (3) an unreasonable and excessively literal reading that stultified its purpose.

Since the record shows that the employer was paying wages lower than the union scale, the Board should have found that Clause (2) was applicable and barred disqualification. The Board, however, failed to give consideration to Clause (2) and confined itself exclusively to the meaning of Clause (3).

It held that the latter clause applied "only to conditions established by the employer" and that, since the employer did not "require" Appellant to resign from her union, the statutory test had not been met. The Board thus imputed to Clause (3) a condition found nowhere else in the Act or in the Board's regulations. On the contrary Regulation III, A, states:

> What is good cause for leaving . . . will not be confined to causes connected solely with the employment itself.

The dissenting Board member logically pointed out that the holding of the majority was totally unrealistic. He said (J. App. 51):

> The claimant had no choice but to resign as she would have lost her union benefits which had been established over a period of years and would have undoubtedly been discharged from the union had she remained with the employer.

To Appellant the result would be the same whether the employer directly required her to resign from her union or provided a job, incompatible with continued union membership, acceptance of which would result in expulsion from the union. The Board's holding thus turned on a distinction without real significance.

The dissenting member further said:

> I am of the opinion that Congress intended it (Clause 3) to apply whenever accepting a job or continuing

> on a job would in effect cause the loss of union status.

This intent is supported by the legislative history.

The Act was enacted two weeks after the federal Social Security Act, August 14, 1935, 49 Stat. 620. The latter Act provided that states would be entitled to federal contributions if they enacted unemployment compensation laws containing, among other things, the provisions of section 10(d) of the District of Columbia Act. Since both Acts were enacted by the same Congress, the provisions of the District Act must be given the same meaning as like provisions of the Social Security Act. Warrin China & Glass Co., Inc. v. Pedrick, 88 F. Supp. 128 (S.D.N.Y. 1949). The purpose of the section 10(d)(3) equivalent in the Social Security Act was to protect a union member from pressure to work under non-union conditions that would jeopardize his union membership and benefits. And Senator Harrison, Chairman of the Finance Committee, which had charge of the bill, explained that, under this section, the worker could not be required to accept employment that would "necessarily interfere with his union affiliations" (70 Cong. Rec. 9271).

Thus, the real concern of this provision of the Act was to avoid interference with union membership, not with unrealistic distinctions between interference resulting from a direct act of the employer and interference resulting from the kind of employment he offered.

In the context of the Act, the choice between resigning and being expelled from a union is not a real one. Yet that would have been Appellant's choice had she stayed on the job when the employer changed to a non-union shop. The Board's decision, turning on that choice, was unreasonable and wholly unrealistic and resulted from an interpretation that sought to follow the letter of section 10(d)(3) but emasculated its spirit.

THE PRECEDENTS RELIED ON BY THE BOARD

The Board's decision rested on the holdings of three state court cases. These holdings are not binding here. Cf., Maeztu v. Brownell, 132 F. Supp. 751, 752-753 (D.C. 1955). And they are unpersuasive, in conflict with the logic of later cases, and rest basically on the same strained literalism that led the Board astray.

A major prop to the literal interpretation in the leading case, Chambers v. Owens-Ames Kimball Co., 146 O.S. 559, 67 N. E. 2d 439 (1946), was that to read the statute otherwise would create an unconstitutional discrimination between union and non-union workers. The court thus made the constitutionality of the Act turn on a narrow and unsupportable distinction: if the employee could, without disqualification, refuse employment where the employer directly required disaffiliation from a union, the Act was constitutional; but if the employee could likewise refuse employment where the disaffiliation would result from the type of shop maintained by the employer, the Act was unconstitutional. It is difficult to understand in what respect the one situation involves more or less discrimination between union and non-union workers than the other.

On the contrary, the dissenting judges correctly pointed out that there was no question of discrimination since the classification was reasonable. They further pointed out that the constitutionality of veterans' legislation had been upheld against similar attack.

Finally, the same court held that employment requiring Saturday work was unsuitable for a Seventh Day Adventist. Tary v. Board of Review, Bureau of Employment Compensation, 161 O.S. 251, 119 N. E. 2d 56 (1956). Seemingly, it found no problem of unconstitutional discrimination there.

Neither in the Chambers case nor in those that followed it does the legislative history here discussed seem to have been considered. All three cases rested on the same or similarly insubstantial grounds

and reversed lower court holdings which were more persuasively reasoned.

The cases on which the Board relied need not, and we submit should not, have been followed.

G. ARGUMENT

The court below decided the case without opinion. This argument is therefore addressed to the Board's opinion which the court presumably adopted.

The Board disqualified Appellant from benefits for a period of five weeks, holding that she had quit her job for good cause (J. App. 51). This holding ran counter to the mandate of the Act and of the Board's regulations.

I BY THE BOARD'S CONTROLLING TEST OF REASONABLENESS APPELLANT ACTED WITH GOOD CAUSE

Section 10(a) of the Act applies to claimants who quit their jobs, section 10(c) and 10(d) to claimants who reject new work. Section 10(a) prescribes disqualification if the Board, "under regulations prescribed by it", determines that the quitting was without good cause. The Board's regulations are thus made controlling since section 10(a) lays down no standard of its own for determining absence of good cause.[2]

Regulation III provides in relevant part:

> A. Voluntary Leaving Without Good Cause
>
> In determining whether the leaving is such as to disqualify the individual for benefits for the time prescribed, it must appear that the leaving on his part was . . . (2) Without good cause, in the light of all such facts, conditions, and circumstances as are relevant to the particular case . . . . What is good cause for leaving will accordingly depend upon the

[2] Section 10(c) prescribes several factors to be considered in determining whether new work is suitable and section 10(d) prohibits disqualification in certain circumstances. These are discussed, infra.

> facts in each case and will not be confined to causes connected solely with the employment itself. The test will be--what would the reasonable and prudent individual in the labor market do in like circumstances. (Emphasis supplied)

In the context of this case there are two classes of individuals in the labor market, union members and those without union affiliation. The fact that the former group constitute a substantial portion of the working population in this community and elsewhere is well known and may be judicially noticed.

A person who does not belong to a union may accept work in a non-union shop without risk or sacrifice. The union member, on the other hand, has an investment of money, time, effort and faith in his union. His allegiance is dictated by a double set of values, moral and practical. He believes in the rightness of trade unionism as a principle and his membership gives him material advantages. He gets a higher scale of wages, better working conditions and greater job security than may be available to non-union employees. His union membership entitles him, among other things, to welfare fund, retirement and death benefits. Finally, membership gives him a social status in the labor community.

To take a job in a non-union shop subjects him to the risk of expulsion from his union and loss of all of his union benefits.[3] And it would have been a violation of principle.

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[3] The record shows that this would have been a serious risk for Appellant had she remained on the job when the employer changed to a non-union shop. Mr. Blackburn, Secretary-Treasurer of the Carpenters District Council, to which Appellant's local is affiliated, testified as follows (J. App. 24):

> MR. HOLDEN: What would have happened if she (Appellant)had continued to work at this place as non-union?
>
> MR. BLACKBURN: It would affect her to the extent that we work on a union basis in the District and her membership would have been deprived if someone had seen her working for Mr. Morrissette after he declared non-union shop.

And when he was asked by the Examiner whether Appellant's acceptance of a non-union job "would be tantamount to resigning from her union", he replied in the affirmative (J. App. 48).

In applying the controlling test of the regulation, therefore, Appellant's conduct must be judged by what the reasonable and prudent union member would do in like circumstances. The standard of the non-union member is as irrelevant as that of the Christian would be in the case of refusal by a devout Seventh Day Adventist or Orthodox Jew to keep a job when Saturday work is required. To make the conduct of the non-union member the criterion could lead only to unjust and bizarre results and would make the test meaningless.

The question, what would the reasonable and prudent union member do in like circumstances, answers itself. He would not willingly take a job in a non-union shop. Even though he might finally be driven to it by necessity, he would not take it at least until he had explored the possibility of finding work in a union shop. And the record shows that Appellant found such work (J. App. 36).

By the controlling test laid down by the Board's regulations, therefore, Appellant acted with good cause and the Board's contrary finding was erroneous.

II THE BOARD ERRONEOUSLY FAILED TO CONSIDER THE FACTORS PRESCRIBED BY SECTION 10(c) OF THE ACT

As noted above, the provisions of section 10(c) and 10(d) expressly apply to a claimant's refusal to accept new work. Superficially, these provisions would therefore appear to be inapplicable to the case of a claimant quitting a job. Yet the Board decided Appellant's case under section 10(d) notwithstanding that it found that she had quit her job. We do not challenge the propriety of considering section 10(d) together with the other applicable provisions of the Act as well as the Board's regulations. We believe, however, that it was error to decide the case solely under section 10(d)(3).

It is probably correct and proper to treat section 10 as an integrated whole and to determine the question of disqualification under all

the provisions of the section. It could hardly have been intended that a claimant should be disqualified for quitting an old job for reasons constituting good cause for refusing to accept a new job. Of course, if the act or circumstance relied on existed when the claimant took the job in the first instance, possibly he should not be permitted thereafter to treat that as good cause for quitting. But the limitation of section 10(c) and 10(d) to cases involving only rejection of new work probably resulted from failure of the drafters to anticipate the type of case, such as the instant one, in which a change in the situation occurred after the claimant took the job. Thus, if a union member accepted employment that, at the very outset, interfered with the maintenance of his union membership, it may be reasonable to say that he made his choice and should be bound by it. But there would be pointless discrimination if a requirement that the employee resign from a union be held to constitute good cause for rejecting new work but, on the other hand, be held not to be good cause for quitting an old job where the requirement was made after the employment had begun.

In any event, the Board's position must be consistent. If it deemed section 10(c) inapplicable to the case of a claimant who quit a job, it should likewise have considered section 10(d) inapplicable and should not have decided the case under that section. On the other hand, if it considered section 10(d) applicable, there was no reason for failing to consider the provisions of section 10(c), providing in relevant part:

> If an individual otherwise eligible for benefits fails, without good cause as determined by the Board under regulations prescribed by it, ... to accept any suitable work . . . he shall not be eligible for benefits . . . . In determining whether or not work is suitable within the meaning of this sub-section the Board shall consider (1) the physical fitness and prior training, experience and earnings of the individual, (2) the distance of the place of work from the individual's place of residence, and (3) the risk involved as to health, safety, or morals.

The Board's Regulation III, C, provides in relevant part:

> C. Failure to Apply for or Accept Suitable Work
>
> The Board will determine what is or is not good cause for failure of an otherwise eligible individual to apply for or accept suitable work. It must first be determined that the work is suitable in a particular case in accordance with the general standards prescribed. However, the Board, in considering such a request, may adopt such further or additional standards as it believes will insure a reasonable determination thereof . . . . In determining whether or not the failure was for good cause, the Board will consider all the facts, conditions and circumstances relevant to the issue.

This the Board failed to do. It not only failed to apply the test of what the reasonable and prudent man would do, it likewise failed to consider the prior experience of Appellant as a worker under union conditions, receiving union wages and other union benefits, and the fact that the employer not only had changed to a non-union shop, but was paying wages lower than the union scale (J. App. 25, 26). Finally, it failed to consider the moral risk to Appellant in working in a non-union shop.

The Court is, no doubt, aware and may judicially notice, that a large number of men and women, irrespective of whether they themselves are, or are eligible to be, union members, have a strong belief in the moral rightness of trade unionism. Inclusion in this group of ministers, doctors, lawyers, retired men and women, themselves not members of unions, evidences that dedication to the union principle is supported not alone by self-interest but by moral considerations as well. Persons so dedicated will not cross a picket line to their places of employment or business or to the stores where they customarily shop. They prefer to buy union-made goods and to patronize union stores. The union label is an appeal to their patronage.

Appellant's testimony reveals her as a member of this group. A simple person of little education, her obviously uncalculated answers to questions show how strongly, and indeed how almost reflexively, she

rejected the idea of working in a non-union shop:

J. App. 19

> . . . You wanted me to know it (the shop) was non-union. That meant I was through to have him tell me that.

J. App. 22, 23

> MR. BURKE: After that you didn't bother to come in.
>
> MRS. ECKE: Mr. Morrisette called and said it was non-union. They went non-union.
>
> * * *
>
> MR. BURKE: You intimated you were not going to work. You didn't say you were not going to work.
>
> MRS. ECKE: I said with the union.
>
> * * *
>
> MR. BURKE: You don't want that employment?
>
> MRS. ECKE: Not as long as I am a union member.
>
> MR. BURKE: Your answer is that you don't want to work as long as he is non-union?
>
> MRS. ECKE: I want to stay with the union.

J. App. 40, 42

> MR. BURKE: You would work for a non-union shop?
>
> MRS. ECKE: No, I wouldn't. If I found out they were non-union I wouldn't go there . . .
>
> * * *
>
> MR. BURKE: My question, isn't it a fact you knew there was work available for you at the shop up to the time of the hearing?
>
> MRS. ECKE: It was non-union.
>
> * * *
>
> MR. BURKE: So you didn't bother to come back?
>
> MRS. ECKE: Not when he went non-union.
>
> * * *
>
> MR. BURKE: I say to you again as of this moment if you were needed at the shop you still would not go to work?

MRS. ECKE: Not non-union.

Appellant's simple answers reflect her belief that the mere statement of her refusal to work in a non-union shop was sufficient to justify her rejection of the job. It apparently never occurred to her that some explanation might be necessary, for example, that she might lose her union membership and benefits if she took non-union work.[4] Nor does it seem to have occurred to her that any one would question the propriety of her refusal to accept non-union work. Her attitude was one of moral rightness which is its own justification.

To a person, having, as Appellant plainly does, strong moral convictions about the rightness of unions, acceptance of non-union work is morally wrong, and the Board should have given weight to the moral risk in this case and thus avoided a position that, as pointed out in the analogous case of Swenson v. Michigan Employment Security Commission, 330 Mich. 430, 65 NW 2d 709 (1954), "would completely exclude thousands of citizens . . . from the benefits of the Act."

In a number of states the unemployment compensation statutes provide that work shall be deemed unsuitable if, as a condition of being employed, the individual is required to resign from any bona fide labor organization.[5]

An attorney general's opinion and a number of administrative decisions uniformly hold that non-union work is not suitable for a union member if it may result in loss of union membership. In these decisions weight is given to the lower wage paid in non-union shops and the risk to the union members of loss of his investment in and benefits from the union. For convenience these are included in Appendix B hereof.

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4 Testimony to this effect was supplied by Mr. Blackburn of the union.

5 The language generally used is that: "No work shall be deemed suitable... (c) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization." The language of clause (c) is identical with section 10(d) (3) of the District of Columbia Act which is discussed, infra.

In Refusal of Suitable Work, 55 Yale L. J. 134, 143-144 (1945) it is said:

> There can be little doubt that loss of status in his union and the attendant consequences will be a substantial harm to him and thus a sufficiently good cause for his refusal.

The work rejected by Appellant was unsuitable for her as a union member and the denial of benefits was not warranted.

III SECTION 10(d) OF THE ACT BARRED DISQUALIFICATION OF APPELLANT

As noted above, we believe that the Board was probably correct in considering the provisions of Section 10(d)(3) of the Act to be applicable to the case of a claimant who had quit his job. The Board erred, however, (a) in ignoring its own regulations and other applicable provisions of the Act and in deciding the case solely under section 10(d)(3), and (b) in attempting to read Clause 3 so literally as to frustrate its purpose.

The Board found that Appellant had quit her job and that section 10(d)(3) referred "only to conditions established by the employer." It reasoned that the employer did not require that Appellant resign from her union and therefore that she did not come within the shelter from disqualification provided by this section (J. App. 50). Board member Preller dissented saying (J. App. 51, 52):

> I am of the opinion that the claimant did not voluntarily quit by leaving her employment with the Eareckson Rug Company in the first instance but was constructively discharged when that company went from a union shop to an open shop. The claimant had no choice but to resign as she would have lost her union benefits which had been established over a period of years and would have undoubtedly been discharged from the union had she remained with the employer. Furthermore, I am of the opinion that Congress did not intend section 10(d)(3) of the Act to apply only to conditions set out by the employer but also intended this section to apply to situations as in

> the present instance. I am of the opinion that Congress intended it to apply whenever accepting a job or continuing on a job would in effect cause the loss of union status. The union rule involved is one of long standing, is reasonable and is one of the cornerstones of successful union operations. Any other interpretation of this section would not be realistic and accordingly I dissent from my fellow Board Members on the question of disqualification . . . .

We believe that the dissent is soundly reasoned and the majority of the Board was demonstrably incorrect.

(a) The Scheme of the Act - Assuming, arguendo, what we believe to be incorrect, that Section 10(d)(3) applies "only to conditions established by the employer", it did not follow, as the Board held, that Appellant acted without good cause. We have shown, supra, that under section 10(a) of the Act, and Regulation III, A, by the reasonable and prudent man test, Appellant acted with good cause. We have likewise shown that under section 10(c) and Regulation III, C, the work was not suitable. The Board erred in failing to give consideration to these provisions.

The scheme of the Act is a simple one. The determination of what conduct is without good cause is left to the Board "under regulations prescribed by it." Nowhere does the Act itself say what shall not constitute good cause. Nevertheless, it protects the employee by specific guides to, and even limitations on, the Board's discretion. Section 10(c) directs the Board to consider several specified factors in determining suitability of work. And section 10(d) prohibits disqualification in certain circumstances. These limitations, however, are not preclusive. The Board is left wholly free to prescribe regulations under which the quitting of a job or the rejection of new employment would be for good cause even in the absence of any of the circumstances stated in section 10(d).

Had the Board decided the case under its own regulations and the other applicable provisions of the Act, it could not properly have

disqualified Appellant.

(b) Under the Test of Section 10(d)(3) of the Act, Appellant Could Not Properly Be Disqualified

The Board erred further in giving section 10(d)(3) what it deemed to be a literal reading. Actually even a literal reading of the section does not support the Board's holding, and, in any event, that holding runs counter to the broad purposes of the Act and the specific intent disclosed by the legislative history.

Section 10(d) provides:

> "(d) Benefits shall not be denied to any otherwise eligible individual for refusing to accept new work under any of the following conditions: (1) If the position offered is vacant due directly to a strike, lock-out, or other labor dispute; (2) if the wages, earnings, hours, or other conditions of the work offered are less favorable to the individual than those prevailing for similar work in the locality; (3) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization."

If the Board was correct in reading condition (3) as applying only to a requirement established by the employer then this is the only provision in all of section 10 that justifies rejection of work solely on that basis. Section 10(d)(1) refers to strikes or other labor disputes, which obviously may not be the responsibility of the employer and indeed may occur despite his determined efforts to avoid them; less than prevailing wages, referred to in section 10(d)(2), depend as much upon what other employers do as upon what the employer offering the job does. And all three considerations in section 10(c) are, in some cases partly, in others exclusively, the claimant's, not the employer's doing. Finally, regulation III, A, categorically states:

> What is good cause for leaving . . . will not be confined to causes connected solely with the employment itself. (Emphasis supplied.)

In this context, it is appropriate to ask why section 10(d)(3) alone

should have been singled out as a case in which only the employer's actions are relevant. As correctly pointed out in the dissent, this is certainly not a realistic view. As a practical matter, it makes no difference whether the employee's affiliation with the union is terminated by the direct act of the employer or by the fact that the job is such that acceptance is incompatible with continued union membership. In either case the employee's union membership is jeopardized, a result that the Act plainly seeks to avoid.

Board member Preller, dissenting, stated, "I am of the opinion that Congress intended it (section 10(d)(3)) to apply whenever accepting a job or continuing on a job would in effect cause the loss of union status." That intent is supported by the legislative history.

(c) The legislative history

The Act was enacted August 28, 1935, two weeks after the passage of the Social Security Act, August 14, 1935, 49 Stat. 620. Under the latter Act, states became entitled to federal contributions if they met certain conditions. Among these was the requirement that they enact unemployment compensation laws containing specified provisions. Thus, section 903 of the federal Act provided in part:

> (a) The Social Security Board shall approve any state law submitted to it, within thirty days of such submission, which it finds provides that . . . .
>
> * * *
>
> (5) Compensation shall not be denied in such state to any otherwise eligible individual for refusing to accept new work under any of the following conditions . . . . . (B) if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality; (C) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization;

This is substantially the language of the District Act as well as most state Acts which were enacted pursuant to and in conformity with the federal law.

The state laws obviously were required to conform with the spirit as well as the letter of the federal model, and the intention of Congress must, therefore, govern the construction of the state Acts. In any event, Congress also enacted the District law which is, in this respect, identical with the Social Security Act and must be given the same meaning. Warrin China & Glass Co., Inc. v. Pedrick, 88 F. Supp. 128 (S.D.N.Y. 1949):

> Whenever a legislature has used a word or phrase in a statute in one sense and with one meaning, and subsequently uses the same word or phrase in legislating on the same subject matter, it will be understood as using it in the same sense and having the same meaning. Apfel v. Mellon, 1929, 59 App. D.C. 94, 33 F. 2d 805; Marks v. United States, 1895, 161 U.S. 297, 16 S. Ct. 476, 40 L. Ed. 706

The federal Act became law two decades ago. That was the era of the "New Deal", in which unprecedented efforts were made by both the legislative and executive branches of the government to foster, advance, and strengthen the development of labor unions. In the social and political climate which then prevailed, it would almost be taken for granted that a statute enacted for the benefit of labor should be construed most favorably to labor; that indeed, no law would have been intended to penalize the refusal of a union member to work in a non-union shop at the cost of his union membership and benefits. And that, in fact, is what is reflected in the legislative history of the federal Act.

Under President Roosevelt, there was a cabinet Committee on Economic Security. In Hearings on what was then the proposed Economic Security Act, H. R. 4120, before the House Committee on Ways and Means, 74th Cong., First Sess., page 36, the Committee on Economic Security, which had drafted the bill, reported:

> Workers, however, should not be required to accept positions with wage, hour, or working conditions below the usual standard for the occupation or the particular region, or outside of the state, or where their rights of self-organization and collective bargaining would be interfered with.

This was the intent of the bill. Senator Harrison, Chairman of the Finance Committee, which had charge of the bill, explained it in part as follows (79 Cong. Rec. 9271):

> The fourth provision is for the protection of the worker, who is ordinarily cut off from benefits where he refuses profferedemployment. It provides that such proffered employment need not be accepted where the hours or other conditions of the job offered are substantially less attractive than those of similar jobs in the locality and that the employment is not[6] such as to necessarily interfere with his union affiliations. (Emphasis supplied)

This was what the bill was understood to mean by those who drafted and enacted it. This was the purpose to which the state and District laws were required to conform.

(d) Legislative purpose must prevail over literalism

The Board presumably gave what it thought was a literal reading to section 10(d)(3) of the Act: "if as a condition of being employed the individual would be required . . . to resign from . . . any bona fide labor organization." The Board held in effect that it must be the employer who requires the claimant to resign from his union. That, however, is not what follows even from a literal reading. The statutory language lends itself just as well to the construction that the claimant's resignation (the alternative being expulsion) from his union would result from acceptance of the employment.

But even if section 10(d)(3) were not susceptible to a literal reading, other than the Board gave it, the unrealistic result would require rejection of such literalism. The holding in the analagous Swenson case, supra, commends itself for its sound practicality. The court said (65 N. W. 2d at 712):

> . . . regardless of its fine-spun reasoning, we suggest that the commission could have been more realistic in its handling of the matter. The law is

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6 Sic. The insertion of the word "not" is obviously a typographical error.

> designed to apply to all situations within its contemplation, and the commission's attitude, if upheld, would completely exclude thousands of citizens of this state from the benefits of the Act. That could never have been the intent of the legislature; nor should we so construe the Act as to accomplish that result.

In any event, literalism must yield to the legislative purpose. The fundamental function of interpretation of a law is to give effect to that purpose. Literalism which defeats it must be rejected. As Judge Learned Hand said in Cabell vs. Markham, 148 F. 2d 737, 739 (2d Cir., 1945):

> But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.

And the Supreme Court, affirming, said, 326 U. S. 404, 409:

> The policy as well as the letter of the law is a guide to decision. Resort to the policy of the law may be had to ameliorate its seeming harshness or to qualify its apparent absolutes as Church of the Holy Trinity vs. U. S., 143 U. S. 457, 36 Led 226, 12 S. Ct. 511 illustrates. The process of interpretation also misses its high function if a strict reading of a law results in the emasculation or deletion of a provision which a less literal reading would preserve.

So also it was said in In Re Vacontios' Petition, 155 F. Supp. 427, 429-430 (S.D.N.Y. 1957):

> In resolving a conflict of this sort it is important to consider the purpose of Congress in enacting the statute under consideration as well as the specific words used by Congress to achieve its desired result. As was stated by the Supreme Court in Holy Trinity Church v. United States, 143 U. S. 457, 459, 12 S. Ct. 511, 512, 36 L. Ed. 226, "it is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers;"

We submit that the purpose of section 10(d)(3) is to protect a union member from pressure to accept non-union employment. That purpose was frustrated by the Board's psuedo-literal, unrealistic and erroneous construction.

IV THE BOARD RELIED ON PRECEDENTS THAT ARE NEITHER CONTROLLING NOR PERSUASIVE

The Board rested its decision entirely on the holdings in Chambers v. Owen-Ames Kimball Co., 146 O.S. 559, 67 N.E. 2d 439 (1946); Bigger v. Unemployment Comp. Comm., 43 Del. 553, 53A, 2d 761 (1947); Barclay-White Co. v. Unemployment Comp. Bd. of Rev., 356 Pa. 43, 50 A. 2d 336 (1947); cert. denied 332 U.S. 761.

Since decisions in other federal courts of appeals are not binding on this Court or the court below, Maeztu v. Brownell, 132 F. Supp. 751, 752-753 (D. C. 1955); In Re Etherton, 88 F. Supp. 874, 876 (S.D. Calif. 1950), it follows, a fortiori, that the state court decisions, relied on by the Board, likewise are not. That apart, the legislative history of the local unemployment compensation legislation and the Social Security Act seems not to have been considered in those cases, and their reasoning in any event, is unpersuasive and is in conflict with the logic of later cases.

(a) The Chambers case

The first of the three decisions relied on by the Board was that in the Chambers case. This decision reversed the unanimous holding of the Ohio Court of Appeals, 62 N. E. 2d. 496, that refusal by a union member of non-union employment was refusal for good cause where acceptance would have resulted in loss of union membership. The Court of Appeals said, at p. 439:

> . . . "condition of being so employed" means the condition arising by reason of the actual employment, actual work on the job.

The Ohio Supreme Court held, two judges dissenting, that

"condition of being employed" meant a requirement by the employer, and that to hold otherwise would be an unconstitutional discrimination between union and non-union workers, 67 N. E. 2d at 442, 443.

Thus the court sought to support the shaky foundation of literalism on the solid ground of constitutionality. We believe, however, that no real constitutional question was presented. And even if one had been present, the court did not succeed in resolving it. It said in effect that if the union disaffiliation resulted directly from the employer's requirement, the immunity from disqualification for rejecting the work would be constitutional. But if the union disaffiliation resulted from the type of employment offered by the employer, the immunity from disqualification for rejecting the work would be unconstitutional. It is difficult to see in what respect the one involves more or less discrimination between the union and non-union worker than the other. On the contrary, in both cases, there is a reasonable classification as between union and non-union workers which rules out any substantial question of discrimination.

We submit that the dissenting judges correctly rejected the majority's discrimination argument, saying that the classification of union and non-union workers was reasonable and not unconstitutional and they pointed out that veterans' legislation had been upheld against similar attack (p. 446). They construed the Act as meaning that a claimant should not be disqualified for rejecting work where, as an incident of being employed, "he would be adversely affected in his relations in any bona fide labor organization".

Moreover, the majority in the Chambers case gave weight to the absence of testimony that the claimant requested a permit from the union to accept non-union employment or that the union would not have granted such request if it had been made. In the instant case there is such testimony (J. App. 24):

> MR. HOLDEN: Suppose you had a member for whom you can find no work, what do you do, give them permission to work in a non-union shop?

> MR. BLACKBURN: We give no consent for them to work in a non-union shop.

Finally, the court that decided the Chambers case found no problem of unconstitutional discrimination when it held in Tary v. Board of Review, Bureau of Unemployment Compensation, 161 O.S. 251, 119 N.E. 2d 56 (1954), that employment requiring Saturday work was not suitable for a Seventh Day Adventist. Similar holdings were made in Swenson v. International Employment Security Commission, 330 Mich. 430, 65 N.W. 2d 709 (1954) and in In Re Imogene R. Miller, 243 N.C. 509, 91 S.E. 2d 241 (1956). These cases hold that the necessity to work on Saturday would subject the Seventh Day Adventist to moral risks within the meaning of the provisions in state laws similar to section 10(c)(3) of the District of Columbia Act. But no act of the employer requires the claimant to be or cease to be a Seventh Day Adventist. He merely provides employment which is incompatible with the worker's church's tenets, just as, in the case of the union member, the employment is incompatible with his union principles and with his continued union membership.

(b) The Barclay case

The Barclay case, supra, likewise reversed the decision of the lower court, 46 A. 2d 598, which had posed the problem as follows (p. 602):

> Is an unemployed worker obliged to accept suitable employment when its acceptance subjects him to the loss of membership in an organization which is sanctioned and encouraged by law, and thereby sacrifice valuable property rights? Is an employee who refuses referred suitable work in such circumstances "without good cause"?

Pointing out the importance of unions in society and the recognition given them by statute, the court gave its answer (p. 603):

> Thus we have before us all the factors which we said in the Sturdevant case, supra, constitute "good cause", and transform what is ostensibly voluntary employment into involuntary employment. We have

> "the pressure of real not imaginary, substantial not trifling, reasonable not whimsical circumstances," and these compelled claimant's decision to refuse the referred employment. The threat of expulsion was real not imaginary; it was contained in the by-laws; it was communicated by a reasonable union official to the claimant; and other members had been suspended or expelled for the same cause. It was substantial not trifling; loss of membership in the union would deprive claimant of valuable property rights, the accumulated death benefits, and the opportunity to obtain and retain work at union rates. It was reasonable not whimsical; Rule 2 is enforceable as a reasonable and lawful regulation. Claimant's refusal contains all the elements of good cause.

The Pennsylvania Supreme Court, relying on the literal reading in the Chambers case, held, one judge dissenting, that membership in the union was the claimant's voluntary act and that refusal of proper employment, because it would result in expulsion from the union, was likewise a voluntary act (50 A. 2d at p. 341). The Court also indicated that to hold that claimant had acted with good cause might make his entitlement to compensation depend on capricious union laws (p. 343). The latter ground was entirely hypothetical. The Court made no finding that the union rule prohibiting members from taking work in a non-union shop was arbitrary, capricious or unreasonable.

The dissenting judge stated (p. 342) that the holding below:

> is not only sound but accords with what I take to be the overwhelmingly predominant weight of authority in this country (both decisional and editorial) on the question involved.

(c) The Bigger case

The Bigger case, like the others, reversed the lower court, 46 A. 2d 137, and turned upon a narrow reading of the Delaware Act which at that time contained language identical with section 10(d)(3) of the District of Columbia Act. The Court held that the statutory language "condition of being employed" meant "conditions imposed by the employer." And it is significant that the Court's decision seems to

have been legislatively overruled. In 1947 the Delaware Act was amended, 46 Del. laws, Ch. 162, Sec. 6, so that the provision parallel to section 10(d)(3) of the District of Columbia Act now reads:

> but no individual otherwise qualified to receive benefits shall lose the right to benefits by reason of a refusal to accept a referral of new work if--
>
> "(A) As a condition of being so employed, he would be required by the employer to join a company union, or would be required by the employer to resign from or refrain from joining any bona fide labor organization <u>or would be denied the right by the employer to retain membership in and observe the lawful rules of any such organization;</u> (Title 19, Sec. 3315).

The emphasized language was added by the amendment. At the very least, the added language would cover a situation where, as in the case at bar, the non-union employer paid wages below the union scale, since it is a basic principle, incorporated in union rules, that union members should not work for less than union wages.

We submit that the holdings relied on by the Board elevate literalism and form over spirit and substance. They are not persuasive, and the better view, reflecting the real legislative purpose, is stated by the lower courts and the dissenters. As was said in <u>Refusal of Suitable Work</u>, 55 Yale L. J. 134, 143-144:

> . . . It would appear, however, that a finding should be made that the individual has good cause for refusing such employment ("under conditions contrary to union rules"). There can be little doubt that loss of status in his union and the attendant consequences will be a substantial harm to him and thus a sufficiently good cause for his refusal. Nor would it appear pertinent to inquire into the reasonableness of the union rule that would bring about the expulsion. The harm to the individual will occur, and, therefore, the good cause will exist whether the union rule is reasonable or unreasonable.
>
> Moreover, where a claimant will be expelled from his union for performing work under certain conditions and where such conditions do not obtain

> for similar work in the locality, and, therefore, the same result would not follow if he were to accept such similar work, a finding that he is not disqualified may be mandatory under the second Clause of the labor standards provision; it may be necessary to find that the "conditions of work" are substantially less favorable to the individual than those prevailing for similar work in the locality.

H. CONCLUSION

The Board should have considered all pertinent parts of the Act and its own Regulations. Had it done so, it would necessarily have reached the conclusion that non-union employment is not suitable for a union member and that the rejection of such employment in the circumstances of this case was for good cause. It erroneously limited its consideration to the provision of section 10(d)(3) of the Act and then compounded the error by giving that provision a narrow unrealistic construction that frustrated the legislative purpose. The order below, upholding the Board's decision by granting the Board's motion for summary judgment and by denying Appellant's motion for summary judgment, was likewise erroneous and should be reversed with directions to deny the Board's motion and grant Appellant's motion.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX
SUPPLEMENT I

STATUTES AND REGULATIONS

Sec. 10 of the District of Columbia Unemployment Compensation Act, August 28, 1935, 49 Stat. 951, Ch. 794, sec. 11; June 4, 1943, 57 Stat. 114, Ch. 117, sec. 1; Title 46, sec. 310, District of Columbia Code.

* * * * *

DISQUALIFICATION FOR BENEFITS

"SEC. 10. (a). An individual who has left his most recent work voluntarily without good cause, as determined by the Board under regulations prescribed by it, shall not be eligible for benefits with respect to the week in which such leaving occurred and with respect to not less than four nor more than nine consecutive weeks of unemployment which immediately follow such week, as determined by the Board in such case according to the seriousness of the case. In addition such individual's total benefit amount shall be reduced in a sum equal to the number of weeks of disqualification multiplied by the weekly benefit amount.

* * * * *

"(c) If an individual otherwise eligible for benefits fails, without good cause as determined by the Board under regulations prescribed by it, either to apply for new work found by the Board to be suitable when notified by any employment office or to accept any suitable work when offered to him by any employment office, his union hiring hall, or any employer direct, he shall not be eligible for benefits with respect to the week in which such failure occurred and with respect to not less than four nor more than nine consecutive weeks of unemployment which immediately follow such week, as determined by the Board in such case according to the seriousness of the refusal. In addition, such individual's total benefit amount shall be reduced in a sum equal to the number of weeks of disqualification multiplied by the weekly benefit amount. In determining whether or not work is suitable within the meaning of this subsection the Board shall consider (1) the physical fitness and prior training, experience and earnings of the individual, (2) the distance of the place of work from the individual's place of residence, and (3) the risk involved as to health, safety, or morals.

"(d) Benefits shall not be denied to any otherwise eligible individual for refusing to accept new work under any of the following conditions: (1) If the position offered is vacant due directly to a strike, lockout, or other labor dispute; (2) if the wages, earnings, hours, or other conditions of the work offered are less favorable to the individual than those prevailing for similar work in the locality; (3) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization.

* * * * *

"Regulations on Benefit Payments" adopted by the District Unemployment Compensation Board pursuant to Sec. 13(b) of the District of Columbia Unemployment Compensation Act.

REGULATION III - DISQUALIFICATION FOR BENEFITS (See section 10 of the Act)

A. Voluntary Leaving Without Good Cause

In determining whether the leaving is such as to disqualify the individual for benefits for the time prescribed, it must appear that the leaving on his part was (1) voluntary in fact, within the ordinary meaning of that term, and (2) without good cause, in the light of all such facts, conditions, and circumstances as are relevant to the particular case. Ordinarily a leaving will be presumed to be involuntary on the part of the claimant unless the facts clearly indicate otherwise. Where it appears that the leaving was voluntary, the burden of proof shall be on the claimant to establish good cause. What is good cause for leaving will accordingly depend upon the facts in each case and will not be confined to causes connected solely with the employment itself. The test will be -- what would the reasonable and prudent individual in the labor market do in like circumstances. (Approved October 26, 1954, effective January 1, 1955.)

For example, the following in general, would not be considered good cause for leaving:

1. Refusal to obey reasonable rules and regulations
2. Minor reduction in wages

3. Transfer from one type of work to another which is reasonable and necessary
4. Marriage or divorce, resulting in a change of residence
5. General dissatisfaction with work
6. Vague prospects of other work deemed by the claimant more desirable.

If the Board finds that a claimant has left his most recent work without good cause, it will proceed to fix such a period of disqualification and resultant cancellation of potential benefit rights (within the limitation of the Act) as it deems warranted by the character and circumstances of the voluntary separation with due consideration to the claimant's past record of employment, duration of most recent employment, and other mitigating circumstances. (Approved October 26, 1954, effective January 1, 1955.)

* * * * *

C. Failure to Apply for or Accept Suitable Work

The Board will determine what is or is not good cause for failure of an otherwise eligible individual to apply for or accept suitable work. It must first be determined that the work is suitable in a particular case in accordance with the general standards prescribed. However, the Board in considering such a request may adopt such further or additional standards as it believes will insure a reasonable determination thereof. The term "work" as here used applies in its broad and general sense and includes services performed in both covered and exempt employment. Likewise, the term "wages" as used in this subsection applies to all remuneration for services performed either in employment as defined in the Act and these regulations or otherwise. In determining whether or not the failure was for good cause, the Board will consider all the facts, conditions and circumstances relevant to the issue.

For example, the following generally would not constitute good cause for failure either to apply for or accept new work when offered:

1. Slight difference in wages or hours of work
2. Difference in locality where transportation facilities are adequate and economical

3. Temporary physical disability which does not substantially interfere with ability to work

4. General or personal objections to employer or to fellow workers

If the Board finds that the claimant has failed without good cause to either apply for new work or to accept any suitable work offered to him by any employment office, his union hiring hall, or by any employer direct, it will proceed to fix such a period of disqualification and resultant cancellation of potential benefit rights (within the limitation of the Act) as it deems warranted by the character of his failure to accept an offer of employment and the degree of reasonableness of his refusal to seek or accept suitable employment with due consideration to the claimant's past record with the Board, length of unemployment, and such other circumstances as might be applicable. (Approved October 26, 1954, effective January 1, 1955.)

* * * * *

SUPPLEMENT II

TEXT OF DECISIONS AND OPINIONS UNDER STATE UNEMPLOYMENT COMPENSATION LAWS

10415-Ark. AG October 11, 1945

Mr. M.E. Goss
Commissioner of Labor
State House
Little Rock, Arkansas

Suitable work 170

A nonunion job is not considered suitable for a member of a labor union who cannot accept such work without resigning from, giving up, or forfeiting his union membership, and benefits cannot be denied such a worker on that account if he is otherwise eligible. A refusal of nonunion work, on that account, by a union member who can work on the job without resigning from or losing his membership is a refusal of suitable work which renders him ineligible for benefits.

Dear Mr. Goss: This letter will acknowledge receipt of your request for my opinion regarding the interpretation of the term "suitable

work" as it appears in article 5, section 1 [sec. 5 (c) (1)] of the Arkansas Employment Security Law.

Attached to your letter is a copy of a letter addressed to you by the president of the M Union in which it is stated that the Director of the Employment Security Division takes the position that any union member who refuses to accept employment on a nonunion job forfeits his eligibility for unemployment insurance.

The answer to your question will be found in section 2 of article 5 [sec. 5(c) (2)] which reads as follows:

"Notwithstanding any other provisions of this Act, no work shall be deemed suitable and benefits shall not be denied under this Act to any otherwise eligible individual for refusing to accept new work under any of the following conditions: (a) If the position offered is vacant due to a strike, lockout, or other labor dispute; (b) if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality; (c) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bonafide labor organization."

From the statement in your letter I take it that an interpretation of the last condition is called for. As I understand and am informed, a member of a labor union cannot work upon a nonunion job without resigning from, giving up, or forfeiting his union membership, and, under the Law just quoted, if he is required to refrain from joining or must resign from or forfeit his union membership in order to work on a nonunion job, then, under the provisions of section 2 [sec. 5(c) (2)] above quoted, this work would not be considered suitable work and he could not be denied benefits under the Act on that account if otherwise eligible.

In your further hearing on this matter, you will be able to establish whether it is a fact that a union member cannot work upon a nonunion job without losing his union membership, in which case the work could not be deemed suitable and he could not be denied benefits on that account. If, however, your hearing develops the fact that a union man can work on

a nonunion job without resigning from or losing his membership, then, under section 2 [sec. 5 (c) (2)], the offered work would be deemed suitable and if he refused on that account he would then be ineligible to receive benefits.

Very truly yours,

GUY E. WILLIAMS,
Attorney General,
CLEVELAND HOLLAND,
Assistant Attorney General

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* * * * *

11216-Ky. A

No. 6332

Decision of Referee
March 26, 1946

Suitable work 170

A union coal loader who refused employment in his customary occupation because the employer was not affiliated with any union, held to have refused unsuitable work with good cause, inasmuch as his acceptance would have compelled him to resign from his previously chosen labor organization.

Facts: The claimant worked for the M Corporation for approximately 4 months prior to May 31, 1945, on which date he was laid off due to lack of work. He filed claim for benefits on August 9, 1945, and on September 4, 1945, he was offered employment in his usual line of work by the appellee-company. The claimant failed to accept this work, and on October 11, 1945, an adjusted determination was issued which imposed a disqualification of eight additional waiting weeks and reduced the claimant's maximum amount by eight times his benefit rate. From this determination the claimant appealed.

The claimant did not appear at the hearing and the following facts are taken from the record. The claimant was a member of a miners union and had worked as such at his last job. When advised of the employment offered him by the appellee-company he reported to the superintendent of that company and inquired about the job. He was advised that the job

would be that of coal loading and that the mine was not affiliated with any union. He then declined the offer.

The company's representative was present at the hearing. He stated that the job offered the claimant was that of coal loader and admitted that the mine at that time was not working under an agreement with any union.

Decision: The adjusted determination is set aside. It is hereby held that the work offered the claimant by the appellee-company was not suitable work and that he had good cause for refusing it.

Reason: The Kentucky Unemployment Insurance Law in Ky. R. S. section 341. 100 (2)(c) provides as follows:

> "***no work shall be suitable and neither waiting period credit nor benefits shall be denied under this chapter to any otherwise eligible worker for refusing to accept new work*** under one or more of the following: ***
>
> "'(c) If, as a condition of being employed, the worker would be required to join a company union or to resign from or refrain from joining any bona fide labor organization'."

It is undisputed that it would have been necessary for the claimant to resign from his previously chosen union if he had accepted the job offered him. As this condition existed it is clear from the above-quoted section that a disqualification cannot be imposed upon his claim because in the eyes of the Law the job offered was not suitable work.

* * * * *

10644-Mich. A

No. B5-3262

Decision of Referee
July 13, 1945

Suitable work 170

A claimant who refused reemployment in a nonunion shop as a press feeder at 80 cents an hour because the wage was below the union scale and less than her most recent rate of $1. 09 1/2, in a union shop, and because she would have been obliged to relinquish her union standing as a full-fledged member upon payment of the final installment on the initiation fee, held to have had good cause for refusal, considering that her membership, even though only tentative, was an investment and she would have been subject to expulsion and other disciplinary action by the

union for accepting employment in a nonunion shop.

Facts: On February 23, 1945, claimant filed a claim for benefits, in which she certified that she was laid off for lack of work on January 3, 1945, by the M Printing Company. On June 1, 1945, the Commission made a determination that claimant was disqualified for unemployment benefits in accordance with section 29 (b) of the Act for week ending May 10, 1945, and for 3 weeks immediately following, together with a deduction of three times her weekly benefit rate from the total amount of benefits to which she would otherwise be entitled, for having, on May 9, 1945, refused without good cause an offer of suitable work made to her by the N Printing Company. On June 5, 1945, claimant took an appeal, which came on for hearing at the X local office on June 28, 1945.

Claimant furnished the Commission with the following signed statement:

"I admit that I was called back to work at the N Printing Company. They said that it was pressing feeding. They told me that it was work for a few days. It was the same work that I was doing when I left. I was getting 80¢ an hour when I quit. I would not go and accept the work because it was not the Union scale. I should get $1.09 1/2 an hour. This is the Union rate. I belong to O Printing Union."

The N Printing Company, the sole base-period employer, furnished the Commission with the following statement:

"This morning May 9th we called A [claimaint] to come in to work. We wanted her to run a Hand Feed Press, (the forms to be put in for her). We offered her 80¢ an hour which is the rate set for that job in January 1944 by W. L. B.

"To date she had not come in. The reason seems to be that she wants $1.09 an hour. Our understanding is that we cannot pay this rate, for a person with her limited qualifications."

Claimant testified as follows: She worked for the N Printing Company as a pressfeeder at a rate of 75 cents an hour, from April 13, 1943, to sometime in September 1944, on which date she quit. This company is nonunion shop. While working there, she applied for membership in

the O Union and was accepted tentatively as member. She is now paying the initiation fee on the installment plan, and has paid in $15 out of the required $22. Just before quitting this employer she was put on a binding job, part time, at 65 cents an hour. The union objected to her working for that rate. A week after quitting, for which period she did not claim benefits, she accepted employment as a pressman at $1.09 1/2 with the M Printing Company, a union shop. She was laid off by them for lack of work on January 3, 1945. On May 9, 1945, claimant was offered a job by the N Printing Company to run a hand-feed press at 80 cents an hour. She refused to accept it for the reason that she would be obliged to relinquish her standing in the union if she worked for a nonunion shop. Moreover, the rate paid on the job was 10 cents an hour below the union scale. On June 25, 1945, she was rehired by the M Printing Company, as a pressman, at $1.09 1/2 an hour. She stated that B, the employer's representative, in offering her the job, told her that it would be for only 3 or 4 days as she would be taking the place of another worker who was off temporarily because of illness.

B, the representative of the N Printing Company, testified that the company was paying rates which had been approved by the National War Labor Board, and that if claimant accepted the job, the company would probably have applied to the NWLB for approval to raise the rate on the job to 90 cents an hour, which was the union rate, with retroactive effect. She stated that it was true that claimant was offered a job of another worker who had broken his ankle, and that claimant might have misunderstood her when she offered the job, and got the impression that the job would last only until the other worker returned. However, if claimant had accepted it, she would have continued on.

Reasons: Although claimant was not a full-fledged member of the union, nevertheless she was tentatively a member until her initiation fee was paid in full. There is no reason to believe that upon the full payment of the initiation fee, she would not have become a member in good standing. Notwithstanding that claimant had not yet become a fully paid up member, she was nevertheless subject to the rules and regulations of

the union. It is a well-known fact that a member (as well as one who is tentatively accepted) of any of the printing-press unions is subject to expulsion and other disciplinary measures for accepting employment in a nonunion shop. A member in a printing-press union has an investment. In the event of expulsion he not only loses what he paid in; he also loses retirement pension and hospitalization rights.

The Digest of Selected Decisions, published by the Commission, Vol. VI, Supp. 2, page 37, states the following concerning the decision of referee, No. B3-970:

"Claimant, a carpenter and union member, was separated from employment in X where he earned up to $1.62 per hour. He then moved to Z, transferring his membership to the union local in that vicinity. The union contract rate on certain projects in the community was $1 per hour, which was tentatively established as the criterion. Claimant was referred by the United States Employment Service to employment with a nonunion contractor on a temporary job at 80 cents per hour, such job to last only 1 week or 10 days. Claimant refused the job.

"'In holding that claimant had good cause for refusing an offer of work and was not subject to disqualification under section 29(b) of the Act, the referee said in part:

"'The claimant was offered a job in his customary occupation, at a wage equal to the prevailing rate, but below the union rate in that locality. He refused the offer of work because it was below the union rate and because of the possibility of being fined or suspended, or both, by the union if he accepted the work offered.

"'The local of which the claimant is a member in good standing, has given him a permit to work with another local and in order to maintain the right to work through the union at a wage established by it, he refused the work offered. In view of the possibility of being fined or suspended or both by the union, and the fact that the job he refused to accept was only for a week or 10 days, I am of the opinion that he refused the offer with good cause.'"

Based upon the foregoing considerations it is held that claimant had good cause for refusing the offer of work.

Decision: The determination of the Commission dated June 1, 1945, is hereby reversed and set aside. Claimant is entitled to benefits if otherwise eligible.

10735-Mich. R

No. B4-3535-RM-2622

Decision of Appeal Board
February 8, 1946

Able and available 60
Suitable work 170

A union clerical worker who, when laid off, refused work in another department where employees had no union representation, because she had been advised that acceptance would entail the loss of her union membership and her seniority, and who actively sought employment of any type not requiring her to withdraw from the union, held to have had good cause for refusal, despite a subsequent ruling by an "umpire" that individuals in her circumstances would not be required to withdraw from the union nor lose their seniority rights, when she was justified in her belief, inasmuch as the question was an issue at the time of the offer; and to be available for work when she actively sought and desired to obtain immediate employment. The refusal of one offer of work does not necessarily imply unavailability for work.

This matter is before us upon an appeal by the claimant from the referee's decision (No. B4-3535-RM) dated September 28, 1945, which held as follows:

"On the basis of the record and evidence in this case and for the foregoing reasons, the determination of October 4, 1944, is modified, it being held that the claimant is subject to disqualification under section 29(b) with respect to week ending September 30 and three additional weeks, plus the statutory deduction from benefits otherwise payable, on the grounds that she refused without "good cause" an offer of "suitable" work on September 26, 1944. It is also held that the claimant has not established her eligibility for benefits under section 28(c) of the Act and such status will continue until a substantial change of circumstances is shown to exist."

On the basis of the contentions of the parties and the circumstances involved there are presented herein two issues. These are first, whether or not this claimant, on September 26, 1944, refused without good cause to accept an offer of suitable work within the meaning of the provisions of section 29 (b) of the Act, and, second, whether or not she established her eligibility for benefits under the provisions of section 28 (c) of the Act from September 26, 1944, when she filed her claim for benefits to the time when she returned to work.

The claimant was employed by the M Company as a clerical worker from March 17, 1943, to September 26, 1944, when she was laid off due to lack of work. On the same day she was offered clerical work in the N building which she refused to accept. During her employment with this company the claimant was a member of a union and it appears that her principal reason for declining the work offered was because of an agreement existing whereby employees in the N building were not and could not be represented by a union. It is claimant's contention that she refused to accept the work offered for the principal reason that she would be required to withdraw from her union, thereby losing the protection which such membership guaranteed and also her seniority.

At the hearing before the referee the claimant testified positively that she had been advised by her committeeman that it would be necessary for her to withdraw from the union in the event she accepted the work offered. She testified further this was the primary reason for her refusal of the work. She also testified that she was not only ready and willing to accept but had been actively seeking employment of any type with any employer which would not require that she withdraw from the union.

At the referee's hearing her testimony was introduced to the effect that as a matter of fact she would not have been required to withdraw from the union or to relinquish her right of seniority. It was further brought out by testimony however that at the particular time of the offer this question was at issue and that due to a lack of understanding the matter was referred to the umpire who some months later made a ruling to

the effect that under the circumstances herein existent an individual would not be required to withdraw from the union and would not lose her seniority.

It is our finding that the record establishes that the work offered was suitable. It is our further finding however that in view of the existent circumstances claimant had good cause to refuse such work. This finding is based upon the evidence in the record establishing that the claimant refused the work because of her honest belief that she would lose her seniority if she accepted this specific job, and establishing that she had every right and reason to so believe. It is accordingly held that the claimant did not, on the day in question, refuse without good cause to accept an offer of suitable work.

We find that the record very clearly establishes that this claimant was at all times subsequent to the filing of her claim, actively seeking and desirous of obtaining immmediate employment. We have on numerous previous occasions held that the refusal of one offer of employment did not necessarily imply that such claimant was unavailable for work. It is accordingly our finding that the record can substantiate no other finding but that this claimant established her eligibility for benefits under the provisions of section 28 (c) of the Act for the period in question. It is so held.

The decision of the referee is hereby reversed.

---

* * * * *

10135-Okla. R

No. 31-BR-45

Decision of Board of Review
August 29, 1945

Able and available 170
Suitable work 170

A union painter who refused nonunion work paying less than the union rate because acceptance would subject him to a $50 fine and expulsion from his union, with resultant loss of benefits incident to many years of union membership, held to have had good cause for refusal inasmuch as it is the purpose of the Law to grant relief without penalty to

both union and nonunion workers. (Appeal tribunal's decision of non-availability reversed.)

On review from the findings and decision of the appeal tribunal affirming a determination by the Commission, denying benefits on the ground claimant was not available for work. Reversed.

* * * * *

Findings of Fact: The claimant is a painter by trade or occupation, specializing in inside painting and interior decorating. He has followed his trade or occupation for the last 30 years, except for the time he enlisted in the United States Navy and served our country in World War I in the years 1917 and 1918. All during this time he has lived at X, Oklahoma and earned a living for himself and family at his trade or occupation.

X, Oklahoma, is the county seat of X County, and has a population of 16,000. Its principal industries are glass factories, oil refineries, packing plants, wholesale establishments, a small railroad yard, numerous wholesale oil supply houses, machine shops, and allied industries, and it is in this city the claimant has pursued his occupation or trade for the past 30 years.

On the 15th day of November 1944, he was separated from his last employer, the M Investment Company, and immediately made numerous attempts to secure other employment. The reason for his separation was that he went to the airport to make arrangements for another job which he intended to pursue the moment the job with the M Investment Company was finished. Upon returning, another man was found in his place and the foreman on the job gave him a check for the amount of work he had performed, * * *

His claim was duly filed with the Claims Department of the Oklahoma Employment Security Commission at X, and he was referred to one job. When he appeared for work at the job referred to, he found that it was a nonunion job and nonunion men employed there at a lesser rate of wages. He informed the department that he was a union painter and had belonged to the union all of his life, and that the rules, regulations, by-laws, and constitution of his union would not permit him, or any other

member of the organization to work on nonunion or open-shop jobs, and that if he would work in violation of the rules, regulations, bylaws, and constitution of his organization, he would be fined the sum of $50, expelled from the union, and lose all the insurance benefits he had acquired. The facts further show that a nonunion man to work on a union job would require a $50 initiation fee, and if a union man worked on a nonunion job he forfeits his membership, is fined $50, and loses his insurance benefits.

Conclusions of Law: Section 6 (c) (2).

" Notwithstanding any other provisions of this Act, no work shall be deemed suitable and benefits shall not be denied under this Act to any otherwise eligible individual for refusing to accept new work under any of the following conditions: (A) If the position offered is vacant due directly to a strike, lockout, or other labor dispute; (B) if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality; (C) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization."

Subsection (C) of the above section may be construed in three ways: (a) The claimant is not required to join a company union; (b) he is not required to resign from the union he already belongs to; (c) nor is he restrained from joining a bona fide organization.

In the instant case, the claimant refused to resign from a union, which he had a right to do under the Law, and still be entitled to benefits, and even if he had accepted the employment his organization would have expelled him, fined him $50, and cancelled his insurance benefits.

It is not the intention of the Law to penalize an individual, either union or nonunion, under such circumstances. On the other hand the Law protects a person and holds that work shall not be suitable, if, as a condition of being employed, the individual would be required to join a company union, resign from his own union, or restrained from joining a bona fide union.

Section 2 of the Act reads in part as follows:

"Economic insecurity due to unemployment is a serious menance to the health, morals, and welfare of the people of this State. Unemployment is therefore a subject of general interest and concern which requires appropriate action by the Legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life."

Construing section 2 and 6 (c) (2) of this Act together, we find that economic insecurity due to unemployment falls with the same crushing force upon the union and nonunion worker alike, and for that reason the Law looks beyond the narrow limits of human institutions and grants relief without penalty to both union and nonunion worker.

Decision: The refusal of the offer to work is with good cause. The decision of the appeal tribunal is reversed. Benefits shall be paid accordingly.

Connecticut B

No. 319-B-54

Decision of Commissioner
Second Congressional District
July 23, 1954

Union relations:
Nonunion shop or supervisor

Suitable work 475.55
Able and available 475.05

A union painter who refused a referral to nonunion work because the acceptance of such work would result in the loss of his union membership, but who was ready, willing, and able to accept any kind of suitable work, held not disqualified for his refusal when the referral was not to suitable work, and to be available for work.

* * * * *

Finding of Facts: (1) The claimant is a married man, aged 27, living with his wife and their two children. One of these children is 3 years old and the other is an infant aged about 7 weeks at the hearing date.

(2) The claimant worked for the M Company as a painter for about 4 years. His wages were $1.95 an hour when he was laid off due to lack of work on March 7, 1954.

(3) On April 28, 1954, the employment service offered the claimant a referral to a nonunion painting job with A at $1.50 an hour. The claimant refused the referral.

(4) The claimant is a member of the N Union. By arrangement with the union, he could work at the M Company, but he could not work on a nonunion job such as that offered on April 28 without jeopardizing his union membership.

(5) During his claim series, the claimant was ready, willing, and able to accept any kind of suitable work. His wife was ill on April 28 and thereafter, but if he had obtained work, he could have made arrangements for her care.

(6) The claimant was recalled to work at the M Company on May 12, 1954. He was employed there at the hearing date.

Decision: The referral offered the claimant on April 28, 1954, was not a referral to suitable work, as acceptance of such a job would cause him the loss of his union membership. The evidence also shows that the claimant was, during his claim series, available for work. His claims for benefits are valid, and the examiner's decision is reversed.

[The Connecticut Act provides for only 1 administrative appeal.]

NEW YORK B

Decision of Appeal Board
October 16, 1953

No. 38,071-53

Union relations:
Requirement to join or retain membership in bona fide labor organization

Voluntary leaving 475.75, 475.8

A carpenter whose employer was in contractual relationship with a union requiring all his employees to join within 30 days of the date of hire as a condition of continued employment, who did not return to work after the plant was closed for 1 week, because complying with this requirement would result in expulsion from his own union and would also result in forfeiture of his disability,

death, funeral benefits and pension rights, held to have left voluntarily with good cause.

* * * * *

Findings of Fact: Claimant, a carpenter, is a member of the carpenters union (M Union). The union scale for carpenters in the claimant's local in Buffalo, New York, is about $2.90 per hour. On November 18, 1952, claimant being unemployed, accepted employment as a carpenter performing maintenance work at the hourly rate of $1.92 with a manufacturer of electrical products, hereafter referred to as the N Company. Under such employer's agreement with the O Union representing its employees, all workers are required to join the union within 30 days of the date of their employment as a condition of continued employment. On December 24, 1952, the plant closed for 1 week. Claimant did not return to work thereafter because joining the O Union would result in his expulsion from his own union.

Among the working rules of claimant's union is rule 16, reading as follows:

"No member of any of the affiliated locals of this district shall work on any job or in any shop, mill or factory, with any person employed in any of the branches or subdivisions of the carpentry industry, unless such person is a member in the Buffalo District or working on a permit and carrying the due book of the M Union."

Claimant had worked at the N Company under the supervision of and together with other carpenters who were members of the O Union in that plant. One of his coworkers was the steward of such organization. Claimant's union organizes maintenance carpenters. The union representative contends that the purpose of the prohibition of rule 16 was to protect the autonomy of the carpenters union. He stated further that it was an unwritten law in the building trades that a union member cannot carry a card in more than one union. The penalty for claimant's continuing on the job would have been loss of his union membership. If he took a withdrawal card from the carpenters union to continue on the job, he could reenter the carpenters union only as a new member by payment of the

initial fee. He would suffer the loss of disability, death, and funeral benefits and it would also interrupt the continuity of his union membership upon which pension rights depend.

Before deciding to leave the job at the N Company claimant had endeavored to ascertain from the foreman and the employer's personnel department whether the work was steady, but could obtain no assurance as to the length of time the job would last. He would have been willing to remain and take a withdrawal card from his union if the employment were of a permanent nature. Claimant filed a claim for benefits, effective January 5, 1953. He obtained employment through his union in March 1953, and has been working continuously since at the rate of $2.90 per hour.

The local office issued an initial determination disqualifying claimant from receiving benefits for 42 days, effective January 5, 1953, on the ground that he voluntarily left his employment without good cause. Claimant protested and requested a hearing. The referee overruled the initial determination, from which decision the employer and the Industrial Commissioner appealed to the Board.

Opinion: Section 593.1(b) of the Unemployment Insurance Law provides as follows:

> *** in addition to other circumstances that may be found to constitute good cause, voluntary leaving of employment shall not in itself disqualify a claimant if circumstances have developed in the course of such employment that would have justified the claimant in refusing such employment in the first instance under the terms of subdivision two of this section;

Subdivision 2 of section 593 above referred to, insofar as applicable to this case, reads as follows:

"2. Refusal of employment. No benefits shall be payable to any claimant who without good cause refuses to accept an offer of employment for which he is reasonably fitted by training and experience, including employments not subject to this article. No refusal to accept employment shall be deemed without good cause nor shall it disqualify any claimant otherwise eligible to receive benefits if

"'(a) acceptance of such employment would either require the

claimant to join a company union or would interfere with his joining or retaining membership in any labor organization'.* * *"

Claimant contends that continuance in the employment of the N Company would result in the loss of his union membership. Consequently, the issue to be decided herein is whether or not acceptance of such employment requiring membership in another union would interfere with claimant's "joining or retaining membership in any labor organization" within the meaning of section 593.2. We believe that the record in this case warrants a holding in claimant's favor.

Rule 16 of claimant's union prohibited claimant's continuance on the job and at the same time retaining membership in his union, since other persons employed there at carpentry work were not members of or holders of working permits from claimant's union. This rule was designed to protect the autonomy of claimant's union which organizes maintenance carpenters, such as those with whom claimant had been working. We cannot conclude that this rule was unreasonable. There is sufficient proof that claimant would have suffered the loss of his union membership had he continued on the job at the N Company and joined the other union as a condition thereof.

There is abundant evidence that claimant was justified in complying with the prohibition contained in rule 16. Before leaving the N Company and deciding whether or not to withdraw from his union, claimant attempted to ascertain whether there was any permanency to his job at the N Company but was unable to obtain any information from persons in authority. As a member of the carpenters union claimant, while working, was able to earn about $1 per hour more than the rate paid him at the N Company. Within a comparatively short time claimant did obtain work through his union at the higher union rate and is presently so employed. In addition, membership in his union carried with it various benefits including pension rights dependent on continuous membership, all of which would have been forfeited had claimant remained in the employ of the N Company.

We conclude upon all of the facts in this case that claimant's continuance at the N Company would interfere with his union membership, that he was justified in complying with the union rule, and that his voluntary leaving was with good cause within the meaning of the Unemployment Insurance Law.

Decision: The initial determination of the local office disqualifying claimant from benefits for 42 days, effective January 5, 1953, for voluntary leaving of employment without good cause is hereby overruled.

The decision [No. 71-70-53R] of the referee is affirmed.

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
District of Columbia Circuit
FILED APR 1 1958
Joseph W. Stewart
CLERK

No. 14,307

IDA H. ECKE,

Appellant,

v.

DISTRICT UNEMPLOYMENT COMPENSATION BOARD,
and
AEM, INC., t/a S. Groome Eareckson,

Appellees.

No. 14,308

AEM, INC., t/a S. Groome Eareckson,

Appellant,

v.

IDA H. ECKE, et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Washington, D. C. ROBERT I. THIEL Printer EX 3-0625

UNITED STATES COURT OF APPEALS

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APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOINT APPENDIX

INDEX

	Record Page	Appendix Page
Appeal from Decision of District Unemployment Compensation Board	1	1
Answer of Defendant, AEM, Inc., and Cross Appeal from Decision of District Unemployment Compensation Board	3	2
Answer of Defendant, District Unemployment Compensation Board	7	5
Plaintiff's Motion for Summary Judgment	9	6
Motion of Defendant, District Unemployment Compensation Board for Summary Judgment	10	7
Answer of Defendant, District Unemployment Compensation Board, to Cross Appeal by Defendant, AEM, Inc.	11	7
Answer of Plaintiff to Cross Appeal by Defendant, AEM, Inc.	14	9
Points and Authorities of Cross-Appellant, AEM, Inc., in Opposition to the Motions of the Plaintiff and Defendant, District Unemployment Compensation Board, for Summary Judgment		10
Memorandum of Judge McGuire, Filed November 13, 1957	16	13
Order Granting Summary Judgment in Favor of Defendant, District Unemployment Compensation Board	17	13
Notice of Appeal of Ida H. Ecke	19	14
Notice of Appeal of AEM, Inc.	20	14
Transcript of Testimony at Hearing of August 4, 1955.		15
Transcript of Testimony at Hearing of September 12, 1955		28
Decision of District Unemployment Compensation Board dated January 24, 1956.		48

JOINT APPENDIX

1 [Filed February 27, 1956]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IDA H. ECKE, 11918 Valley Wood Drive, Silver Spring, Maryland, Plaintiff, vs. DISTRICT UNEMPLOYMENT COMPENSATION BOARD, 451 Pennsylvania Avenue, N. W., Washington, D. C., and AEM INC., t/a S. GROOME EARECKSON, 821 Howard Road, S. E., Washington, D. C. Defendants	Civil Action No. 854-56

APPEAL FROM DECISION OF
DISTRICT UNEMPLOYMENT COMPENSATION BOARD

1. This is an action to review a final decision of the District Unemployment Compensation Board, made and served upon the plaintiff on January 31, 1956. This court has jurisdiction of this action pursuant to the provisions of Title 46, Section 312, of the District of Columbia Code.

2. Plaintiff filed a claim for unemployment compensation benefits pursuant to the provisions of the District of Columbia Unemployment Compensation Act (Title 46, D. C. Code, Section 301, et seq.) After hearings held on August 4, 1955, and September 12, 1955, before an Appeals Examiner of the Board, the said Appeals Examiner rejected, in part, plaintiff's claim for unemployment compensation benefits. Thereupon, both the plaintiff and the defendant, AEM INC., appealed to the District Unemployment Compensation Board. Following a hearing held before the full Board on December 20, 1955, the Board, by its decision adopted on

January 31, 1956, denied the plaintiff unemployment compensation bene-
2 fits for the period from June 12, 1955, through July 16, 1955, on the basis of its holding that the plaintiff was disqualified from receiving benefits during the said period pursuant to the provisions of Section 10 of the District of Columbia Unemployment Compensation Act (Title 46, D.C. Code, Section 310).

3. The Board's denial of unemployment compensation benefits was not proper and was contrary to applicable provisions of law.

4. The plaintiff has exhausted all of her administrative remedies as provided in the District of Columbia Unemployment Compensation Act. Wherefore, the plaintiff demands that the said order of the District of Columbia Unemployment Compensation Board be vacated and that the Board be directed to award unemployment compensation benefits to the plaintiff for the period from June 12, 1955, through July 16, 1955, and that the plaintiff be granted such other and further relief as may be appropriate.

Plaintiff further requests that this appeal be heard at the earliest possible date and that it be given precedence over all other civil cases in accordance with the provisions of Title 46, Section 312(a) of the District of Columbia Code.

/s/ Philip J. Lesser
Attorney for Plaintiff
917 - 15th Street, N.W.
Washington 5, D. C.

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3 [Filed February 29, 1956]

ANSWER OF DEFENDANT, AEM, INC., AND CROSS APPEAL FROM DECISION OF DISTRICT UNEMPLOYMENT COMPENSATION BOARD

ANSWER

1. Defendant, AEM, Inc., admits the jurisdiction of this Court.

2. Defendant, AEM, Inc., admits, in substance, the allegations contained in paragraph two of the complaint.

3. The Board's denial of unemployment compensation benefits for

the period from June 12, 1955 through July 16, 1955, was perfectly proper and in conformity with the weight of the law and with the provisions of Section 10 of the District Unemployment Compensation Act (Title 46, D.C. Code, Section 310). The Defendant, AEM, Inc., states, however, that the Board's ruling and finding under Section 9(d) of the Act, that the claimant was available for work and was therefore entitled to benefits from July 16, 1955 to August 5, 1955, was in error and in conflict with its own ruling in the same order, and that such part of the finding of the Board which allows benefits of any kind to the plaintiff should be reversed.

5 4. The defendant, AEM, Inc., admits that all administrative remedies have been exhausted under the District Unemployment Compensation Act, but states that the order of the District of Columbia Unemployment Compensation Board which directs the payment of benefits to the plaintiff, on and after July 16, 1955, should be vacated and that the Board be directed to discontinue the payment of any further benefits to the plaintiff out of the account of the defendant, AEM, Inc., and that all payments which have been paid to the plaintiff out of such account should forthwith be restored to the account of AEM, Inc.

CROSS APPEAL

1. Jurisdiction is vested in this Court pursuant to the provision of Title 46, Section 312 of the District of Columbia Code, the defendant and cross-appellant, AEM, INC., having exhausted all administrative remedies available to it.

2. As will be noted from the contents of the findings and order of the District Unemployment Compensation Board, the plaintiff was employed by the defendant, AEM, INC., doing business as S. Groome Eareckson, a rug repair and cleaning service, as a seamstress on an on call basis. She continued to work for the cross-appellant until June 12, 1955, at which time the principal officer of the cross-appellant announced that it would no longer operate a union shop but would operate as an open shop and that all of its employees were free to remain or to quit as they saw fit. The plaintiff voluntarily elected to quit and to seek employment elsewhere. The record is very clear that, from the very day

that the plaintiff first voluntarily resigned, to this very date, the identical type of employment in which she had been employed at the business of the cross-appellant has been available to her and was offered to her repeatedly at each hearing, including the hearing before the Board. Such employment is again herewith offered her.

2. Because the plaintiff was apprehensive about losing her membership in her union if she continued to work for the cross-appellant,
4 hereinfurther for convenience referred to as Eareckson, she has refused and still refuses to take employment with Eareckson. Nevertheless, even though employment is available for her at Eareckson's, the Board has ruled that she is entitled to draw benefits amounting to $30.00 per week, from the account of Eareckson, and such benefits have been paid to her regularly and are being paid to her since July 16, 1955.

3. The two appeals before the Board, one by the plaintiff and the other by Eareckson, were from rulings by the Examiner. The Eareckson appeal was from a finding that under Section 10 of the Act (Title 46, D.C. Code, 310), the plaintiff was not required to work for Eareckson, because such would in effect be asking her to resign from her union. This ruling by the Examiner was reversed by the Board which found that Section 10 of the Act was intended to regulate the conduct of the employer and not the results of any act of the employer. It is from this ruling that the plaintiff is appealing to this Court. The plaintiff had appealed the ruling of the Examiner under Section 9(d) of the Act, that the claimant (the plaintiff) was not available for work and was thus not eligible for benefits. This ruling was also reversed by the Board which found that the plaintiff had been available and had made effort to obtain employment but was hampered by the transit strike. The appeal to this Court of Eareckson is from the ruling of the Board, that the plaintiff was entitled to benefits after July 16, 1955 because she was available for employment. This ruling is in direct conflict with the Board's ruling that the plaintiff was not entitled to benefits when she voluntarily resigned from the Eareckson firm for the reason that she would lose her union membership, a reason not justified by the law. Inasmuch as the Board found as a matter of fact that

Eareckson had constantly offered her employment and still offers her employment, the other question, decided by the Board under Section 9(d), has become entirely moot, since there was no need for the plaintiff to search for employment elsewhere, her job with Eareckson being then and there continually available to her as it is to this date. She was therefore not available for employment since she refused to take the very employment in which she had been employed for a long period of time and under the same conditions.

6 4. It seems wholly unjust and irrational to say to an employer that "we must charge your account with unemployment benefits to be paid to your employee who is unable to find employment and who is unwilling, for legally unjustified reasons, to work for you". The cross-appellant therefore respectfully prays that this Court reverse so much of the order of the Unemployment Compensation Board of January 31, 1956, which allows the payment of benefits out of the Eareckson account to the plaintiff on the theory that she was available for employment, and direct the Unemployment Compensation Board to discontinue further payments to the plaintiff of any benefits out of the account of Eareckson; and to restore to the Eareckson account all payments which have been made to the plaintiff, out of its account, commencing July 16, 1955.

Respectfully submitted.

/s/ Milton M. Burke
Attorney for Defendant
and Cross-Appellant, AEM,
INC.
1010 Vermont Avenue, N. W.
Washington 5, D. C.

[Certificate Of Service]

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7 [Filed March 15, 1956]

ANSWER OF DEFENDANT, DISTRICT UNEMPLOYMENT COMPENSATION BOARD

1. Defendant, District Unemployment Compensation Board, admits the allegations contained in paragraph No. 1 of the appeal.

2. Defendant, District Unemployment Compensation Board, admits the allegations contained in paragraph No. 2 of the appeal.

3. Defendant, District Unemployment Compensation Board, denies the allegations contained in paragraph No. 3 of the appeal and affirmatively states that the decision appealed from was in accordance with applicable law.

4. Defendant, District Unemployment Compensation Board, admits that the Plaintiff has exhausted all of her administrative remedies.

WHEREFORE, the premises considered, Defendant, District Unemployment Compensation Board, respectfully prays that this honorable
8 Court enter a judgment in its favor on all the issues raised herein, and affirm the decision from which the Plaintiff appeals.

Louis Mackall, Jr.
Joseph Notes
Allen Weil

By /s/ Louis Mackall, Jr.

Attorneys for Defendant-District
Unemployment Compensation Board
451 Pennsylvania Avenue, N. W.
Washington 1, D. C.

[Certificate Of Service]

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9 [Filed May 17, 1957]

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff, by her attorney, moves this Court for an order granting summary judgment in plaintiff's favor for the relief demanded in the complaint based upon the following grounds:

The only issue in this case is whether the order of the District Unemployment Compensation Board, dated January 31, 1956, is correct on the basis of the evidence of record in the case and on the basis of the applicable law.

There are no triable issues of fact in this case.

Plaintiff is entitled to judgment as a matter of law.

/s/ Philip J. Lesser
Attorney for Plaintiff

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10 [Filed May 24, 1957]

MOTION OF DEFENDANT, DISTRICT UNEMPLOYMENT COMPENSATION BOARD FOR SUMMARY JUDGMENT

Comes now the defendant, the District Unemployment Compensation Board, by its attorneys, and moves for summary judgment in its favor against the plaintiff and the co-defendant, AEM, INC., on the pleadings and the findings in the Board's decision of January 24, 1956. For grounds of this motion defendant says:

1. That there are no triable facts in dispute.

2. That there remain to be determined by the Court only questions of law.

3. That the findings of fact of this defendant in its decision of January 24, 1956 are supported by substantial evidence.

4. That the decision of the defendant, District Unemployment Compensation Board, on January 24, 1956, is in accordance with the facts found by it and the applicable law.

5. For such other grounds that may be called to the attention of the court at the time of the hearing on this motion.

/s/ Louis Mackall, Jr.

Louis Mackall, Jr.
Joseph Notes
Allen Weil

Attorneys for Defendant

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11 [Filed May 25, 1956]

ANSWER OF DEFENDANT, DISTRICT UNEMPLOYMENT COMPENSATION BOARD, TO CROSS APPEAL BY DEFENDANT, AEM, INC.

1. Defendant, District Unemployment Compensation Board, admits the allegations contained in paragraph No. 1 of the cross appeal.

2. Defendant, District Unemployment Compensation Board, admits that the Plaintiff was employed by the Defendant, AEM, INC., doing business as S. Groome Eareckson, as a seamstress on an on-call basis until June 12, 1955, and that she voluntarily quit this employment to seek employment elsewhere when the establishment became a non-union shop.

The Defendant, District Unemployment Compensation Board, denies the remaining allegations of the first paragraph numbered 2 of the cross appeal.

3. Defendant, District Unemployment Compensation Board, denies the allegations in the second paragraph numbered 2 of the cross appeal that it has paid the Plaintiff Thirty Dollars ($30.00) a week regularly since July 16, 1955, and denies the remaining allegations of the said paragraph and refers this Honorable Court to the record in this case.

12 4. For answer to paragraph numbered 3, Defendant, District Unemployment Compensation Board, denies that its ruling that Plaintiff was available for employment after July 16, 1955, is in conflict with its ruling that the Plaintiff should be disqualified for voluntarily leaving the work of the cross appellant. It further denies that there was no need for the Plaintiff to search for employment elsewhere other than at Eareckson's and that she was not available for employment because she would not work for Eareckson's. It neither admits nor denies the remaining allegations of paragraph numbered 3 of the cross appeal and refers this Honorable Court to the record in this case.

5. Defendant, District Unemployment Compensation Board, does not answer the allegations contained in paragraph No. 4 of the cross complaint, as they are purely argumentative.

By way of affirmative defense to the cross appeal, Defendant, District Unemployment Compensation Board, states that its findings of fact on the adequacy of the claimant's work search and her availability for work are supported by substantial evidence of record and are therefore conclusive on this Court.

WHEREFORE, the premises considered, Defendant, District Unemployment Compensation Board, respectfully prays that this Honorable Court enter a judgment in its favor on all the issues raised herein, and affirm the decision from which the Defendant, AEM, INC., appeals.

Louis Mackall, Jr.
Joseph Notes
Allen Wein

13 [Certificate of Service]

By /s/ Louis Mackall, Jr.
Attorneys for Defendant

14 [Filed May 25, 1956]

ANSWER OF PLAINTIFF TO
CROSS APPEAL BY DEFENDANT, AEM, INC.

1. Plaintiff admits the allegations contained in paragraph numbered 1 of the Cross Appeal.

2. Plaintiff denies the allegations contained in paragraph numbered 2 of the Cross Appeal except that plaintiff admits that she was employed by the defendant, AEM, INC., doing business as S. Groome Eareckson, a rug repair and cleaning service, as a seamstress on an on-call basis.

3. Plaintiff denies the allegations contained in paragraph numbered 3 and 4 of the cross appeal except that plaintiff admits that the plaintiff and AEM, INC., appealed from the rulings of the hearing Examiner and that, on such appeal, the rulings of the Hearing Examiner were reversed.

4. By way of affirmative defense to the Cross Appeal, plaintiff alleges that the Cross Appeal fails to state a claim upon which relief can be granted.

5. By way of affirmative defense to the Cross Appeal, plaintiff further alleges that this Court has no jurisdiction to adjudicate the matters raised by defendant, AEM, INC., in its Cross Appeal.

15 6. By way of affirmative defense to the Cross Appeal, plaintiff further alleges that the findings of fact of the defendant, DISTRICT UNEMPLOYMENT COMPENSATION BOARD, on the adequacy of plaintiff's work search and her availability for work are supported by substantial evidence of record and, therefore, are conclusive on this court.

WHEREFORE, plaintiff demands that the Cross Appeal of the defendant, AEM, INC., be dismissed.

/s/ Philip J. Lesser
Attorney for Plaintiff

[Certificate Of Service]

POINTS AND AUTHORITIES OF CROSS-APPELLANT, AEM, INC., IN OPPOSITION TO THE MOTIONS OF THE PLAINTIFF AND DEFENDANT, DISTRICT UNEMPLOYMENT COMPENSATION BOARD, FOR SUMMARY JUDGMENT

Comes now the defendant and cross-appellant, AEM, INC., and in opposition to the motions of the plaintiff and the defendant, District Unemployment Compensation, for summary judgment, states as follows:

1. For convenience the cross-appellant, aforesaid, will hereinfurther refer to itself as AEM, to the plaintiff as Ecke, and to the defendant, District Unemployment Compensation Board, as the Board.

2. The motions of both Ecke and the Board are a rehash of previous motions filed by the same parties to dismiss the cross appeal of AEM which was decided in favor of AEM by this Court. Ecke attempts to use excerpts from the transcript of the two hearings to place about herself an aura of innocence with the inference that she did not properly present her case at the first hearing because she had no lawyer present while the employer had a lawyer. She overlooks to inform us that at such hearing the protections customarily given to an employee at hearings of this type by the hearing officer was afforded to her and that in addition to this she was represented by both her son-in-law and an official of the union both of whom, for reason unknown to AEM and seemingly contrary to judicial processes, were given full rights to express themselves both as individuals and as advocates in behalf of Ecke. In fact this is not a fight between an employee and an employer but rather an attempt on the part of a rich and powerful labor union to gain further dominance over management, particularly small business, by attempting to convert the numerous unemployment compensation laws as a vehicle to force unionism upon management. It is believed by AEM that it is not Ecke but it is the union which supplies the legal talent and the funds as well as the momentum which has brought this fight into the Courts and which prior thereto brought about a most extraordinary decision by the District Unemployment Compensation Board.

3. Briefly stated the facts are that Ecke was an employee of AEM and the firm it succeeded for a number of years on a part-time or on-call

basis and averaged about fifty dollars per week in earnings. There came a time in June of 1955 when AEM found it impossible to continue as a closed shop and very considerately informed its employees, including Ecke, that it was going to commence operation as an open shop but that all employees who wished to remain would be retained upon the same conditions and salaries as before. The employees were requested to give a reasonable notice if they were going to leave because of the open shop. Ecke promptly left the employment of AEM without any notice and proceeded to file a claim for unemployment compensation to be drawn against the reserve of AEM. When the Board allowed such claim an appeal was promptly filed by AEM with notice on record and directly to Ecke that AEM had ample work for Ecke and in fact needed her badly and that her job was and is being held open for her. A hearing was held which was decided favorably to AEM. Ecke then filed a petition for a rehearing which again for reasons unknown to AEM was granted and she had her second bite at the apple. At the second hearing Ecke gave testimony which was contrary to that she gave at her first hearing but nevertheless the hearing officer again found partially against her in that although he now ruled that she had a legal right to leave AEM's employment she did not use due diligence in seeking other employment. Cross appeals were taken to the Board and a hearing held which was later supported by memorandums of law and which resulted in a most unique ruling. The Board found that under Section 10(d)(3) of the Compensation Act Ecke had no legal right to voluntarily leave her employment with AEM merely because it created an open shop and still draw compensation from AEM's reserve and penalized her a few weeks' compensation for this but at the same time the Board reversed the finding of the Appeals Examiner that Ecke had not used due diligence in seeking employment and therefore allowed compensation after the penalty period. The appeals of both parties to this Court followed.

4. As to the appeal of Ecke and her motion herein, AEM adopts in toto the points and authorities which were cited by the Board in opposition to the plaintiff's motion for summary judgment. Such points and authorities are by and large identical with those cited by AEM in its brief

filed in connection with its appeal to the Board. It is assumed that such brief is part of the record an available to the Court, if not counsel for AEM will promptly submit copies to the Court. The landmark cases are of course Chambers v. Owens-Ames Kimball Co. 146 O.S. 559, 67 N.E. 2d 439; Bigger v. Unemployment Compensation Commission, 43 Del. 553, 53 A 2d 761; and Barclay-White Co. vs. Unemployment, etc. 356 Pa. 43; 50 A 2d 336. The hearing officer in the absence of proof that he was capricious or arbitrary or guilty of fraud is the sole judge of the facts and the facts are such that it is obvious that Ecke left her employment voluntarily because of the creation of an open shop and was not discharged. Her job, under the same conditions and on the same rate of pay as before has been and is to this date available to her. There is therefore no basis for summary judgment for the plaintiff and if anything, there is a basis for summary judgment against the plaintiff.

5. As to the appeal of AEM there is obvious evidence of a confusion in the decision of the Board on the appeal of AEM as to entitle AEM to judgment and not summary judgment against AEM. The basis of the appeal of AEM is that the Board was in error in finding that Ecke is entitled to compensation because she did exercise due diligence to find other employment. First the Board finds that she voluntarily left the employment of AEM and by reason thereof is not entitled to compensation out of AEM's reserve then, without any finding that employment at AEM is unavailable and in the light of a record replete with offers of employment by AEM, they allow charges against the reserve of AEM in favor of Ecke rewarding her for refusing AEM's employment. How diligent can a person be in a search for employment when such person refuses employment of the same nature and under the same legal conditions as she had been having in the past? The inconsistency and unfairness of the findings results in a frustration which leaves an employer wondering if the law was created to alleviate unemployment, to promote the power of unions, or to place a premium upon laziness, if, in the humble opinion of this advocate, the Board's finding is sustained.

6. In conclusion therefore the defendant and cross appellant, AEM, Inc., respectfully submits that the motion for summary judgment filed herein by Ecke and the Board insofar as they relate to AEM be denied and that on the contrary AEM be granted summary judgment on its cross appeal.

/s/ Milton M. Burke
Attorney for defendant and cross appellant - AEM, INC.

[Certificate Of Service]

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16 [Filed November 13, 1957]

MEMORANDUM

The motion of defendant District Unemployment Compensation Board for summary judgment in its favor against the plaintiff and co-defendant AEM, Inc. on the pleadings and the findings in the Board's decision of January 24, 1956 is granted, both on the facts and on the a law. The motions of the plaintiff Ecke and the defendant AEM, Inc. are denied.

Order accordingly.

/s/ Matthew F. McGuire
United States District Judge

November 13, 1957

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17 [Filed November 15, 1957]

ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT, DISTRICT UNEMPLOYMENT COMPENSATION BOARD

Upon consideration of the motions of defendant, District Unemployment Compensation Board, co-defendant, AEM, Inc., and plaintiff, Ida H. Ecke, for summary judgment on the pleadings and the findings in the District Unemployment Compensation Board's decision of January 24, 1956, and upon consideration of the Points and Authorities filed by all parties and after hearing and argument thereon in open Court it is, by the Court, this 15th day of November 1957,

ORDERED, that the motion of the defendant, District Unemployment Compensation Board for summary judgment be and it is hereby granted and that the motions of the plaintiff and the co-defendant, AEM, Inc., be and they are hereby denied and that the decision of the District Unemployment Compensation Board dated January 24, 1956 be and it is hereby affirmed both as to the facts and the law.

/s/ Matthew F. McGuire
Judge

[Certificate Of Mailing]

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19 [Filed December 13, 1957]

NOTICE OF APPEAL

Notice is hereby given that Ida H. Ecke, the Plaintiff in the within matter, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the order granting the motion of Defendant, District Unemployment Compensation Board, for summary judgment entered in this action on November 15, 1957.

PHILIP J. LESSER

/s/ Philip J. Lesser
Attorney for Plaintiff

Louis Mackall, Esq.
District Unemployment Comp. Board
451 Pennsylvania Avenue, N. W.

Corporation Counsel
Washington, D. C.

Milton M. Burke, Esq.
1010 Vermont Ave. N. W.

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20 [Filed December 14, 1957]

NOTICE OF APPEAL

Notice is hereby given this 13th day of December, 1957, that AEM, Inc., t/a S. Groome Eareckson hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 15th day of November, 1957, in favor of plaintiff, Ida H. Ecke, and defendant, District Unemployment Compensation Board

against said AEM, Inc., t/a S. Groome Eareckson.

/s/ Milton M. Burke
Attorney for AEM, Inc., t/a
S. Groome Eareckson

Philip J. Lesser
Attorney for Plaintiff
917 15th St. N.W.
and
Louis Mackall, Jr.
Attorney for District Unemployment
Compensation Board
451 Pennsylvania Ave. N.W.
Washington 1, D. C.

[Filed March 28, 1956]

Claimant: Ida H. Ecke
Social Security No. 170-09-8148
Appeal No. 7501-a
Date of Hearing: August 4, 1955

Appearances: Claimant
Employer, Eareckson Rug Company, Arthur E. Morrissette
Attorney for Employer, Milton Burke
Two witnesses for claimant.

Appeals Examiner: Mr. H. C. Holden

After being first duly sworn, all parties testified as follows:

Mr. Holden: This involves the claim of Ida H. Ecke. There are two questions, two appeals in fact; one by the Eareckson Rug Company, and they contend that Mrs. Ecke should not receive any compensation whatever. The other is by Mrs. Ecke for quitting without good cause. Two appeals. As I understand the company, they don't object to the disqualification, but they think she should be declared ineligible completely. Is that right?

Mr. Morrissette: Yes, sir.

Mr. Holden: Let me see now. Please state your position, give your name.

Mr. Morrissette: Arthur E. Morrissette.

Mr. Holden: What is your connection with the Eareckson Rug Company?

Mr. Morrissette: I am president.

Mr. Holden: Can you tell me why Mrs. Ecke quit her job? Do you know why?

Mr. Morrissette: Well, we had a change of policy which necessitated the employment of persons not in the union.

Mr. Holden: Which union is that?

Mr. Morrissette: I don't know the exact name.

Mr. Holden: She belonged to the union and you decided to have a non-union shop? Is that the reason she quit?

Mr. Morrissette: Presumably.

Mr. Holden: You don't know for sure? That's the reason she gives.

Mr. Morrissette: That's it, then. She has never told me.

Mr. Holden: As a matter of fact, she didn't give any reason. I don't see any reason.

Mr. Burke: I imagine, sir, the information you received is in connection with the statement I had in my letter.

Mr. Holden: When you file a claim you are supposed to give a reason you left your last job.

Mrs. Ecke: It is on there. I filled it out myself.

Mr. Holden: You mean this one? This doesn't say why you quit. It says you haven't been making a job search on account of the strike. Is that it?

Mrs. Ecke: Yes, sir.

Mr. Holden: She says, "I was recalled to my place of employment and upon finding I had a choice to make, the employer had declared non-union shop; since I have been a union member for eight years, I feel I am within my rights to refuse, to deprive me of numerous benefits I cannot afford to lose." All right. As far as you know, that's the reason she quit?

Mr. Morrissette: Yes, sir.

Mr. Holden: I believe she is a seamstress.

Mr. Morrissette: Yes, sir.

Mr. Holden: How long did she work there? You don't have to give the exact time.

Mr. Morrissette: From March 1, 1954, until when was it, June something?

Mrs. Ecke: The first week in June.

Mr. Morrissette: June 16.

Mrs. Ecke: June 3, 1955.

Mr. Holden: When she worked were her services satisfactory?

Mr. Morrissette: Yes.

Mr. Holden: Did you have anything unpleasant, any arguments, disputes about her work?

Mr. Morrissette: Mrs. Ecke and I always got along very nicely.

Mr. Holden: Did she contend she wasn't being paid enuugh, that the hours were long?

Mr. Morrissette: She never said anything to me.

Mr. Holden: Did she give any notice that she was leaving?

Mr. Morrissette: No.

Mr. Holden: Did she come and tell you the reasons?

Mr. Morrissette: No. She didn't give any notice; neither did we give any notice. We had this situation that developed and she faced it and decided against it; that was all.

Mr. Holden: I understand her job has been open ever since she left at the same wages and working conditions.

Mr. Morrissette: Yes, sir.

Mr. Holden: Have you talked to her and tried to persuade her to come back?

Mr. Morrissette: No, sir. I did through two or three of the men.

Mr. Holden: Had she known her job was open to her?

Mr. Morrissette: Yes.

Mr. Holden: How?

Mr. Morrissette: Through our representatives.

Mr. Holden: What did she tell them?

Mr. Morrissette: Substantially what you just said, she did not want to work non-union shop.

Mr. Holden: Do you want to ask more questions?

Mr. Burke: Just a few. When you announced to your help that you were going to have open shop, did you tell them you wouldn't engage any union members?

Mr. Morrissette: No.

Mr. Burke: Did you have any difficulty with any of these employees, between yourself and them other than the announcement you made?

Mr. Morrissette: Not at that time.

Mr. Burke: Since Mrs. Ecke left your employ, is it not true this is the peak of your season or this is a very good season?

Mr. Morrissette: Yes.

Mr. Burke: And that you have special need for Mrs. Ecke during this time and you are prepared to keep her employed under the same conditions and same basis of pay?

Mr. Morrissette: That's right.

Mr. Burke: That job is open and available?

Mr. Morrissette: On the same conditions, not guaranteed a full week.

Mr. Burke: But that's the way it's always been.

Mr. Morrissette: Yes.

Mr. Burke: Can you tell us from the record just what her average earnings were?

Mr. Morrissette: Let me see. Average around $50.00.

Mr. Burke: Would you say from the time she left and this time and the foreseeable future that she would average that?

Mr. Morrissette: Yes.

Mr. Burke: Did she work every day in the week or what were the arrangements?

Mr. Morrissette: Well, they are on an hourly basis. They could work four or five hours or eight.

Mr. Burke: What did you do, call her when you needed her?

Mr. Morrissette: Or advised her the night before.

Mr. Burke: She didn't have to report a certain time every morning?

Mr. Morrissette: No.

Mr. Burke: You told her in advance the day before to come in a certain number of hours?

Mr. Morrissette: As much as we needed her.

Mr. Burke: I see here there's only two weeks since January 6 when she made a very small amount, $3.20 and another, $9.01. Otherwise, her weekly earnings, according to this, last ran from $23.00 to as high as $55.66.

Mr. Holden: Anything else?

Mr. Burke: One more question. Did you ask Mrs. Ecke to quit?

Mr. Morrissette: No.

Mr. Burke: Did you ask anyone to quit?

Mr. Morrissette: No.

Mr. Burke: That's all.

Mr. Holden: One more question. Were all your employees union before you changed?

Mr. Morrissette: No.

Mr. Holden: Some were union and some were non-union. Did you have trouble with the union?

Mr. Morrissette: No, because the other part of our shop was not what you might say, skilled mechanics, carpenters.

Mr. Holden: Well, all your skilled mechanics union people?

Mr. Morrissette: Yes.

Mr. Holden: What were the seamstresses, the upholsterers? What sort of work did they do?

Mr. Morrissette: Sewing and mending and repairing rugs.

Mr. Holden: That's odd to belong to a carpenter's union. All right. Your name is Ida H. Ecke?

Mrs. Ecke: That's right.

Mr. Holden: Why did you quit this job?

Mrs. Ecke: The Friday before Memorial Day the shop foreman said there was no more work and they decided one seamstress, Miss Snyder, because she could drive the truck. The following Monday she didn't come out, was laid up with a sore finger. They called me and I worked three days and that following Monday you called me, you wanted me to know it was non-union. That meant I was through to have him tell me that.

Mr. Holden: He told you it was a non-union shop and that's the reason you didn't come back?

Mrs. Ecke: The week before that I was discharged.

Mr. Holden: Discharged?

Mrs. Ecke: Yes.

Mr. Holden: You said you came back and worked three days.

Mrs. Ecke: This other girl didn't come out.

Mr. Holden: He said the way you worked was on call. You would come in and do a certain number of hours' work.

Mrs. Ecke: Not after the shop foreman told me I was through. I went in never thinking I was not going to be laid off.

Mr. Holden: Isn't that a little conflicting statement?

Mrs. Ecke: No.

Mr. Holden: You signed this?

Mrs. Ecke: Yes.

Mr. Holden: What did you mean choice to make? Now you tell me you were discharged.

Mrs. Ecke: You remember you came out of the shop and said the men were not going to stay, they were going with the union, given a choice to work with the union. We have to work, we have to have it. Miss Snyder said I wouldn't want to work for less money.

Mr. Holden: You were satisfied with the wages and hours and working conditions.

Mrs. Ecke: At the last there wasn't much work. He didn't have the work, thinking things would pick up.

Mr. Holden: These figures show you averaged $50.00 since January.

Mrs. Ecke: Yes.

Mr. Holden: Do they have other seamstresses?

Mrs. Ecke: Two of us.

Mr. Holden: Is that about what they made?

Mrs. Ecke: We all got the same.

Mr. Holden: All right, now, give your name.

Mr. Reid: Raymond Reid. If I may be permitted to read a statement that I developed myself. Not having a legal mind I had to do the best I could because my mother-in-law, Mrs. Ecke, doesn't have the education, doesn't know how to cope with the situation and I would like to repeat from the time she was first laid off.

Mr. Holden: When was she laid off?

Mr. Reid: The week of May 27.

Mr. Burke: I don't know what the rules are, but I would object to any spokesman. If this gentleman here is qualified as counsel.

Mr. Holden: Are you representing Mrs. Ecke as counsel or as witness? Do you know anything about this?

Mr. Reid: I am representing her as Attorney Burke is representing Mr. Morrissette. She doesn't have money for a lawyer. All we can do is bring out the facts as honestly as possible.

Mr. Holden: I want the facts; the meat in the coconut is why she left this job and why she won't go back now and she clearly states it is because it is non-union.

Mr. Reid: She was misled to a certain extent.

Mr. Holden: In what way?

Mr. Reid: Mr. Morrissette advised her and Miss Snyder to seek employment elsewhere.

Mr. Holden: I don't remember him saying that.

Mrs. Ecke: Another thing, we were all working under the same conditions as Mr. Morrissette wanted, work when you want to.

Mr. Holden: If the shop had continued to be union, would you have remained?

Mrs. Ecke: Yes.

Mr. Holden: It seems simple that the reason you quit was because of the union.

Mrs. Ecke: I did not quit, I was laid off. They told me they would keep one seamstress.

Mr. Burke: Who laid you off?

Mrs. Ecke: Mr. Ronnings.

Mr. Burke: Who is he?

Mrs. Ecke: Shop foreman taking instructions from Mr. Morrissette. He was working in the office.

Mr. Burke: Did he fire anybody?

Mrs. Ecke: He had charge over all the working conditions, he and Mr. Henry.

Mr. Burke: Did he have the power to fire you?

Mrs. Ecke: I don't know. He himself quit.

Mr. Burke: So, at the time you quit, he quit too?

Mrs. Ecke: He was there when I left. That last week, when was it, June 3?

Mr. Burke: You were paid to June 16, $34.28. You worked twenty-four hours that week.

Mrs. Ecke: Because the girl didn't come out.

Mr. Burke: You knew Mr. Ronnings was quitting.

Mrs. Ecke: No.

Mr. Burke: Did you check with Mr. Morrissette that you were discharged?

Mrs. Ecke: No, he was the boss. I wouldn't go over his head.

Mr. Burke: Did he hire or fire you? You didn't bother talking to Mr. Morrissette and you were approached by others? When did you first know Mr. Morrissette wanted you to work for him?

Mrs. Ecke: I didn't know till Henry Hopkins called me because the other seamstress didn't come out. The week after Memorial week.

Mr. Burke: After that you worked and that week; two weeks, 15 1/2 hours the week of June 9 and 24 hours the week of June 16.

Mrs. Ecke: That's right.

Mr. Burke: After that you didn't bother to come in.

Mrs. Ecke: Mr. Morrissette called and said it was non-union. They went non-union.

Mr. Burke: Didn't he put it this way? He was giving you the choice as to whether or not, to decide whether you wanted to work for him or didn't because he had to have an open shop?

Mrs. Ecke: After it was all settled he came in and put it before the others and myself.

Mr. Burke: He didn't tell you you were fired?

Mrs. Ecke: No, he called the following Monday and said he went non-union. As a union member I felt I couldn't give in.

Mr. Burke: When he called you, did he offer you the job at the same wages and working conditions?

Mrs. Ecke: Not that morning, but that week he talked with two of us. He went to see his accountant. You wouldn't have paid $64.00 to each of us.

Mr. Burke: You only averaged $50.00.

Mrs. Ecke: After everything was taken out--

Mr. Burke: But you averaged that all along.

Mrs. Ecke: There's times there you didn't.

Mr. Burke: He didn't tell you your rate of pay would be reduced. You are limited to forty hours a week.

Mrs. Ecke: Yes.

Mr. Burke: And you worked most of the time forty and no one said you were not going to work if the work was available.

Mrs. Ecke: If it was.

Mr. Burke: You told him you were not coming back as non-union. He didn't tell you not to come back. You told him since he was non-union you wouldn't come back.

Mrs. Ecke: We were just talking together and he said he was going non-union. He said to look for work elsewhere.

Mr. Burke: You intimated you were not going to work. You didn't say you were not going to work.

Mrs. Ecke: I said with the union.

Mr. Burke: Mr. Morrissette is saying to you that your job as you had it is available to you under all conditions the same; the same hours; the only thing, it was an open shop, not closed.

Mrs. Ecke: No, I would like to keep with the union.

Mr. Burke: You don't want that employment?

Mrs. Ecke: Not as long as I am a union member.

Mr. Burke: Your answer is that you don't want to work as long as he is non-union?

Mrs. Ecke: I want to stay with the union.

Mr. Holden: Would you answer a few questions? What is your name ?

Mr. Blackburn: Blackburn.

Mr. Holden: What connection do you have with the union that Mrs. Ecke belongs to?

Mr. Blackburn: I am Secretary-Treasurer of the Carpenters District Council and the local is one of the affiliates of the council.

Mr. Holden: What would have happened if she had continued to work at this place as non-union?

Mr. Blackburn: It would affect her to the extent that we work on a union basis in the District and her membership would have been deprived if someone had seen her working for Mr. Morrissette after he declared non-union shop.

Mr. Holden: Suppose you had a member for whom you can find no work, what do you do, give them permission to work in a non-union shop?

Mr. Blackburn: We give no consent for them to work in a non-union shop.

Mr. Burke: Would you censure them if you didn't have employment?

Mr. Blackburn: Did you understand me to say that?

Mr. Burke: I am asking that.

Mr. Blackburn: I give no consent for them to work.

Mr. Burke: Would you censure one of your members if being unable to get employment he took work in a non-union shop?

Mr. Blackburn: If someone turned him in they would be censured.

Mr. Burke: Even if he had no means of livelihood?

Mr. Blackburn: That's right.

Mr. Burke: Do you have benefits while you are out of work?

Mr. Blackburn: No, that is carried by each individual local and I am not sure if that local does or not.

Mr. Burke: I presume Mrs. Ecke has to work to make a living. If the union can't find a job and doesn't pay her any benefits to help support her while she is out of work, if she took a non-union job, nevertheless you say she would be fined and suspended.

Mr. Blackburn: It is possible.

Mr. Burke: If reported to you?

Mr. Blackburn: Yes.

Mr. Burke: If the union found out about it?

Mr. Blackburn: That's correct.

Mr. Burke: That's putting her in a tight spot.

Mr. Reid: This doesn't say anything about withholding. Is that fair?

Mr. Morrissette: Certainly it is fair. I had the girl in the office put down what Mrs. Ecke made.

Mr. Burke: We would be glad to give you the figures.

Mr. Reid: I would like to ask Mr. Morrissette a question.

Mr. Burke: Wait a moment, you are the one being questioned. I just wanted to ask some questions about the union rules.

Mr. Holden: Any other questions you want to ask of anybody? I don't want to ask any. I am through.

Mr. Burke: I am not through either. As I understand the unemployment compensation law, the unemployment is available to a person who is unemployed, but if there is employment available to them of the kind they have been doing they are compelled to accept that employment. I ask you this, forgetting Eareckson Rug Company is involved here. If one of the members of your union finds himself unemployed and along would come a non-union shop and offer him employment fully comparable to the type of employment he has had, would you prevent that person from going to work for that concern?

Mr. Blackburn: In the first place, there is no such place as fully comparable in a non-union shop.

Mr. Burke: In my question, I am giving you a case where there is one comparable as closely as one thing can be comparable to another thing. Would you prevent her from going to work?

Mr. Blackburn: I told you, we consent for no one to go to work in a non-union shop.

Mr. Burke: Your position is if any shop is non-union, the mere fact they are non-union is sufficient for that person to leave her employment and draw unemployment benefits?

Mr. Blackburn: In the first place, if it is a non-union shop it shouldn't be there.

Mr. Burke: The Eareckson Rug Company is non-union and is there. We scale union pay, $1.67. Is that the union scale?

Mr. Blackburn: That's the union scale up till May 9 of this year.

Mr. Burke: What about then?

Mr. Blackburn: $1.75.

Mr. Holden: Here's some questions. You filed this claim on June 9, 1955. Where have you applied for a job in person besides the United States Employment Service?

Mrs. Ecke: Clyde Dent in Silver Spring.

Mr. Holden: What does he operate, a carpet place?

Mrs. Ecke: Yes. Then I called Sloane and they were filled and the strike set in and I couldn't get around.

Mr. Holden: Have you refused any jobs?

Mrs. Ecke: No, I would rather work than sit around the house.

Mr. Holden: Have you had any offers?

Mrs. Ecke: Yes, yesterday she said she didn't know I had called Clyde Dent and he said this shop wasn't big enough.

Mr. Holden: Is it union?

Mrs. Ecke: Yes.

Mr. Holden: Is Sloane union too?

Mrs. Ecke: Yes.

Mr. Holden: Are those the only two you have been to?

Mrs. Ecke: The strike is on. I couldn't get around. It's pretty tough on getting over here from Silver Spring.

Mr. Holden: Does the Greyhound go through there?

Mrs. Ecke: One bus into Silver Spring.

Mr. Holden: Does your husband have a car?

Mrs. Ecke: He has, but he works different hours.

Mr. Holden: How did you get to work at Eareckson?

Mrs. Ecke: Walking and bus.

Mr. Holden: You didn't ride a car pool?

Mrs. Ecke: No, no one leaving at the time I did.

Mr. Holden: Those are the only questions I have.

Mr. Burke: You made an application on June 9?

Mrs. Ecke: That's right.

Mr. Burke: You drew a salary on June 16.

Mr. Holden: She reported that. We charged that against her. There's nothing wrong with that. According to this she left on the third and came back, but she has to report what she made. But that's charged against her.

Mr. Burke: How would she know on June 9 she would be unemployed after?

Mr. Holden: At the time she filed this she was unemployed.

Mr. Burke: Not from these records. She drew a salary June 2, June 9, June 16, and could have thereafter if she wanted.

Mr. Holden: She should know we can prosecute her if she does not report her earnings. She was partially employed. She was on that kind of status ever since she went to work there. By partially employed I mean she made less than her benefit amount. What did she make?

Mr. Burke: $9.00, $23.00, I don't know, these are nets.

Mr. Holden: Her benefit amount is $30.00. If she made over $30.00 we wouldn't pay her. She didn't get anything for those weeks she made $30.00 or more. Any more questions?

Mr. Burke: That's all, sir.

Mr. Morrissette: Can I ask her? I did meet you and Miss Snyder and I also brought the men with me.

Mrs. Ecke: No, the men you talked to that morning and they were mad and you spoke to her and I at the table.

Mr. Morrissette: She told me she would work for me $2.00 an hour.

Mrs. Ecke: She was kidding.

Mr. Morrissette: I don't think she was kidding because she worked for someone else. It wasn't a question of non-union. Mrs. Ecke gave you the impression that I had told her she was fired because she wouldn't accept non-union shop, but I never said I would fire anybody.

Mr. Holden: Did you ever fire her or lay her off?

Mr. Morrissette: No.

Mr. Holden: You said, I am now non--union and it is up to you?

Mr. Morrissette: That's right.

Mr. Holden: The others too?

Mr. Morrissette: That's right.

Mr. Holden: All right. I will send you each a copy of my decision.

Name of Claimant: Ida H. Ecke
Social Security No. 170-09-8148
Appeal No. 7501-a
Date of Hearing: September 12, 1955.

Appearances: Claimant: Ida H. Ecke
Employer: Eareckson Rug Company, Mr. Morrissette
Attorney for Claimant: Philip J. Lesser
Attorney for Employer: Milton M. Burke
Mr. B. B. Blackburn, representing Carpenters' District Council.

Appeals Examiner: H. C. Holden

After first being duly sworn, all parties testified as follows:

Mr. Holden: This rehearing was ordered by the Board to give Mrs. Ecke a chance to present more testimony. So, I, let me see, I will get your names in the record as representing Mrs. Ecke, Philip J. Lesser, Attorney, Counsel for Mrs. Ecke. And Milton M. Burke, Attorney for the employer. Mrs. Ecke is present and Mr. Morrissette, President of Eareckson's Rug Company is present and Mr. B. B. Blackburn, representing the Carpenters' District Council. A hearing was held for Mrs. Ecke and she was disqualified for allegedly quitting her job with Eareckson's voluntarily without good cause. It developed at the hearing that she had only made two job applications since filing her claim and the decision was based on failure to make a diligent work search as required by the law and Board Regulations. The question as to whether she quit her job with good cause was not passed on and she wanted a hearing on the question of job search and that is what the Board ordered the hearing for. So, if you will proceed on the question of job search I think it will be in accordance with the order of the Board.

Mr. Burke: Mr. Holden, before we give her an opportunity to proceed with further testimony, I would like to present an objection to further hearing if my facts are correct.

Mr. Holden: Well, you will have to present that to the Board. They have ordered me to hold this hearing.

Mr. Burke: I still want to go on record. I am not too familiar with the procedure of the Unemployment Compensation Board, but in reading its regulations I note on page 39 of the Act, Section 11(e) the rule

is laid down as to the time within which any further appeals or any further action can be taken on a ruling of an Appeals Examiner. If I am correct here, your ruling was handed down as of August 5, 1955, Decision of the Appeals Examiner in this case. The Resolution of this Board is dated August 23, 1955. Since rule 11(e) states, is that a regulation or the law, this is entitled District of Columbia Unemployment Compensation Act and Rules and Regulations, and page 39 of those -

Mr. Holden: You are referring to the law.

Mr. Burke: I am referring to the law, section 11(e) of the Act, which says that "Unless a petition for such appeal is filed within 10 days after the date of notification or mailing of the decision of an appeal tribunal, or within such ten-day period the Board has taken action on its own motion in accordance with the provisions of this subsection, the decision of the appeal tribunal shall constitute the decision of the Board and shall be effective as such. Any decision of an appeal tribunal which is not so modified or so appealed within such ten-day period is final for all purposes, except as is provided in section 12(a) of this Act" which gives right of review. Pursuant to section 11(e) of the Act, the action of the Board in adopting this resolution is not within the time fixed by the provisions of the Act and untimely and I think the decision of the Appeals Examiner is final and any further hearing will give the party additional bites in the apple. If you take it up with the Board--

Mr. Holden: The Board has taken action on its own motion in accordance with the provisions of this subsection. I have to hold the hearing. When did they file her appeal from my decision?

Mr. Burke: She never filed it. If so, I have no record of it.

Mr. Holden: August 13th was the date.

Mr. Burke: My objection is based on the fact that the only information that was served upon us is the notice of the resolution.

Mr. Holden: The petition for rehearing was filed on August 13th, eight days after my decision.

Mr. Burke: Is this resolution subject to that petition?

Mr. Holden: Yes. It is based on that petition.

Mr. Burke: I want to again go on record to say I feel very strongly, or rather raise a strong objection to filing petition without giving the employer or his counsel a copy of such petition.

Mr. Holden: They didn't furnish you a copy of this petition of August 13, 1955, which was filed by Mr. Lesser as attorney?

Mr. Burke: That's right. This is the first knowledge I have of it and that is the reason I raised my objection. There is nothing in the record insofar as we are concerned.

Mr. Holden: I presume whoever loses the case will take it up with the Board.

Mr. Lesser: May I make a record statement? It does not appear to me, Mr. Appeals Examiner, that the proceedings authorized by the statute are adverse proceedings. We did not deem it necessary that notice be served upon the employer on an appeal from a determination. The second question that I would like to raise concerning counsel's motion to quash this hearing is that section 11(e) of the statute provides that the claimant or any other party to the determination may file an appeal from the initial determination for reconsideration within ten days after notice thereof, and, as has been pointed out, the request was filed within ten days of the original notification.

Mr. Holden: I might say this, it is an adverse proceeding, in this respect. If any payments are made they will be paid out of the employer's account, thereby having an effect on the percentage of unemployment compensation which he will be required to pay. He is partially chargeable. There is another employer in the base period. Most of it would be chargeable to his account.

Mr. Burke: Not only have we all along offered her employment, but she has had that offer until this very day.

Mr. Holden: Well, let's get on with this hearing.

Mr. Lesser: With your permission there are just one or two questions, a few questions that I would like to ask concerning the circumstances of Mrs. Ecke's leaving which I know, I feel certain, from her and her son-in-law having told me what transpired at the last hearing,

were not brought out for you to be able to make an adjudication of the question. With your indulgence, I will take a very few minutes. Mrs. Ecke, I understand that you were discharged from your employment before--

Mr. Burke: I object to leading questions.

Mr. Lesser: This is an informal hearing.

Mr. Holden: Don't ask her leading questions. It is informal. Section 11(c) provides that the rules of evidence do not apply as in the courts.

Mr. Lesser: What were the circumstances of your originally leaving the shop?

Mr. Burke: If you would prefer this to be informal I would not object to it. That was answered thoroughly at the last hearing.

Mr. Holeen: I think it was, on both sides. Let's get cleared up on this informal business. It is my duty simply to use due diligence to ascertain the true facts of the case. So, if you just go along and leave out the objections and let me give weight, try to give weight to the testimony--

Mr. Lesser: Will you tell Mr. Holden what the circumstances of your original leaving were?

Mrs. Ecke: Before he was non-union, he told me I was through. They were only going to keep one seamstress, Miss Snyder. She had a car--

Mr. Burke: This is new. You didn't say that at the last hearing.

Mrs. Ecke: Yes, I did.

Mr. Holden: Did you go back to work?

Mrs. Ecke: A week later Mr. Hopkins called me up and asked me to come up. The seamstress had a sore finger. I had applied for unemployment compensation. He said it wouldn't have anything to do with that. I worked three days. The following Monday he called me up and said he went non-union and didn't want me to be subjected to a fine.

Mr. Lesser: Do I understand you correctly that you had been discharged the week prior to that?

Mrs. Ecke: Yes, I was.

Mr. Lesser: And that you were told to come back as a replacement for a girl with a sore finger? Was that to be steady employment?

Mrs. Ecke: The shop foreman told me he looked downstairs and all over the place and didn't have any more work.

Mr. Lesser: I understand that it was testified to at the last hearing that Mr. Morrissette or somebody on his behalf or someone in Eareckson's offered you work after that. Is that so?

Mr. Holden: After they became non-union?

Mr. Lesser: After this event transpired where she replaced a girl with a sore finger. After her discharge. Did he offer you work, other than three days?

Mrs.Ecke: No. After the first hearing I had a letter from them.

Mr. Lesser: Mr. Holden, I don't know whether you have been supplied with this.

Mr. Holden: Is this the letter that you referred to, dated August 8, 1955, a letter from Eareckson's by Mr. Morrissette which was after the hearing in this case and you say this is the first offer you received since you were discharged?

Mrs. Ecke: Yes, sir. Outside of what he said, that my work was still there. They were non-union then.

Mr. Lesser: Let me supply this for the record. I want to clarify that point. I understand it was not brought out at the last hearing. Did he at any time subsequent to your working for three days, up until the hearing itself, offer you any work?

Mrs. Ecke: He did not.

Mr. Lesser: Did anybody do so?

Mrs. Ecke: No, sir. Never did.

Mr. Holden: Do you want to put this letter in the record?

Mr. Lesser: Yes.

Mr. Holden: This letter is claimant's Exhibit 1.

Mr. Burke: Mr. Holden, again I raise the point that the resolution of the Board, the basis on which you were instructed to hold this hearing, says additional testimony. I submit that all of this was testified to although

the testimony is being altered from that testified to at the first hearing. If there is anything additional, I would like to hear it.

Mr. Holden: There was a record made of the first hearing and if there is altered testimony I will run across it when I compare them. You wrote this letter?

Mr. Morrissette: Yes, sir.

Mr. Burke: You have a copy in the file. A copy was sent to the Board.

Mr. Holden: I don't think I have it, I am pretty sure I don't. It may be at the local office. It doesn't matter. It is already in the record. Oh, yes, here it is. All right, leave this for the record, if you don't mind, the original.

Mr. Lesser: That is all that I have to offer on those two questions which I believe were left out. Now, on the search for work. Mrs. Ecke, I want you to search your recollection and tell me and Mr. Holden as briefly as you can and yet in as much detail as possible what steps you took in looking for work after you filed your claim.

Mr. Burke: Again I object. She thoroughly covered that.

Mr. Holden: At the last hearing you said you had applied to two places.

Mrs. Ecke: I applied to several. Then the strike set in.

Mr. Lesser: Mrs. Ecke, I believe it should be noted in a circumstantial manner. Did you register with the United States Employment Service?

Mrs. Ecke: Yes, sir.

Mr. Lesser: Did you check with the union?

Mrs. Ecke: Yes.

Mr. Lesser: Who with?

Mrs. Ecke: One of the men there at the time. He said he would let me know if he had any openings.

Mr. Lesser: If the Appeals Examiner does not mind, can I be permitted, and since Mr. Blackburn has been sworn, can I ask him questions? Did you consult the business agent of the union?

Mrs. Ecke: Yes, sir. And then I called different places.

Mr. Holden: She testified to that at the last hearing and also Mr. Blackburn.

Mr. Lesser: I would like to bring out that this is a service that the District Council doesn't engage in. Mrs. Ecke is usually handled by the business agent.

Mr. Holden: How may rug companies employing seamstresses would you guess there are here? How many do you know of?

Mrs. Ecke: I know about six or seven, I guess. They are not all union.

Mr. Holden: How many are union?

Mrs. Ecke: Clyde Dent, Sloane.

Mr. Holden: Who are you working for now?

Mrs. Ecke: American Floor Service.

Mr. Holden: Is that a rug company?

Mrs. Ecke: Yes.

Mr. Lesser: Mrs. Ecke, you mentioned Clyde Dent, Sloane, American Floor. Did you check with these places after you lost your job with Eareckson's?

Mrs. Ecke: Continuously. American Floor called me. Another concern called me, but I don't think they were union.

Mr. Lesser: How did you check, by telephone?

Mrs. Ecke: Yes.

Mr. Lesser: Who else did you check with?

Mrs. Ecke: Several places around town.

Mr. Lesser: I have a list here of seven names I understand you had made up at home of places that you called. I would like you to tell Mr. Holden who you spoke to at these places.

Mrs. Ecke: Just the girl that was in the office.

Mr. Lesser: And under what circumstances you checked, whether it was in person or on the telephone.

Mrs. Ecke: On the telephone. I thought if I got one that was near enough I could get there by cab.

Mr. Lesser: Is this your list?

Mrs. Ecke: Yes, sir.

Mr. Lesser: Will you please read the names and tell me in each particular case the circumstances under which you checked, whether by telephone or in person?

Mrs. Ecke: Clyde Dent, Silver Spring. They didn't use seamstresses. I stopped there in person. I called and I was there.

Mr. Lesser: Why didn't they hire you?

Mrs. Ecke: They weren't busy at the time. Hyattsville Rug. I also tried Hecht, but they had their regular people.

Mr. Lesser: How did you try them?

Mrs. Ecke: I was right there.

Mr. Lesser: Was this during the strike?

Mrs. Ecke: It was during the strike. I thought the nearest places, I could get there. Then I called the White Company and Shaffers.

Mr. Lesser: You spoke to them on the telephone?

Mrs. Ecke: White was out, they went out of business.

Mr. Lesser: And what about Shaffer?

Mrs. Ecke: Then I was going to call there, but that was non-union so I didn't bother. American Floor, that was all.

Mr. Lesser: What date did you go to those places?

Mrs. Ecke: I don't remember the date. I called all the time during the time I was home. I didn't want to sit around home.

Mr. Holden: Why didn't you tell me these places at the last hearing?

Mrs. Ecke: There was nothing more said.

Mr. Holden: I asked you how many places you had been to and you said two.

Mrs. Ecke: The first week I went to two and after that I continued to look.

Mr. Holden: I asked you how many places you had been to. The hearing was held on August 4, 1955. You filed your claim on June 9th and the hearing was held on August 4th.

Mrs. Ecke: The ones that were close by --

Mr. Holden: I asked you how many places you had been to up to August 4th and you said two.

Mrs. Ecke: But I called several places. Two I had been to.

Mr. Holden: Are these all union shops?

Mrs. Ecke: Yes. The only places I tried to get in to..

Mr. Holden: You mentioned one that was non-union.

Mrs. Ecke: I didn't go there.

Mr. Holden: You have seven here, is that right?

Mrs. Ecke: Yes.

Mr. Holden: After the hearing you thought of five more?

Mrs. Ecke: I have been calling, calling.

Mr. Holden: Are you sure you didn't go to some of these after August 5th?

Mrs. Ecke: No. I have been looking for work right along.

Mr. Holden: When were you first promised work by the American Floor Service?

Mrs. Ecke: Just a few days after I was told I would have work by the first of September. It was the first week I was out of work. They said they could promise me work by the first of September.

Mr. Holden: When did you go to work for them?

Mrs. Ecke: I went there the first of the month.

Mr. Holden: September 1?

Mrs. Ecke: Yes.

Mr. Holden: Have you been working for them since?

Mrs. Ecke: Yes.

Mr. Holden: Steadily?

Mrs. Ecke: No. There was no work today, but he is going to call me tonight. Some of these places I called to see if they were union and the girl would say yes and some weren't union.

Mr. Lesser: Mrs. Ecke, I am as curious as Mr. Holden to know why this was not brought out at the last hearing. Why didn't you testify to these at the last hearing?

Mrs. Ecke: He said that was all, so we all left.

Mr. Holden: I asked you two or three times how many places you had been to.

Mrs. Ecke: I said I had been to two places but --

Mr. Holden: Were there more than seven?

Mrs. Ecke: When you are out of work you are going to call different places. There are only about seven union shops. I never bothered looking for work because I always had steady work. I never yet applied for unemployment compensation. This is the first time I ever did.

Mr. Holden: Those places you went to there, did you go to any after the date of the last hearing that you had?

Mrs. Ecke: I called up to see if they were union.

Mr. Holden: Some of those you went to see after the hearing?

Mrs. Ecke: Some. Some said they were union and they weren't union.

Mr. Holden: Which did you go to before the hearing?

Mrs. Ecke: Clyde Dent, American Floor. I called up American Floor. Hecht's, I was to Hecht's. For that matter, I was to Lansburgh's too, in town.

Mr. Lesser: We would like to hear all you can remember. There won't be an opportunity after today.

Mrs. Ecke: I called up a lot more than I have done here.

Mr. Lesser: What others did you call? I want you to think very hard and remember which employers you called before the hearing as Mr. Holden asked you to.

Mrs. Ecke: I called a place, I picked them out of the telephone book, and I called them up.

Mr. Lesser: What about the place on Georgia Avenue, Carpet Service on Georgia Avenue?

Mrs. Ecke: I stopped there.

Mr. Holden: Which ones did you apply to in person rather than calling on the phone?

Mrs. Ecke: American Floor.

Mr. Holden: You went there in person?

Mrs. Ecke: Yes. I know him. The Superior Carpet Shop on Georgia Avenue. The girl said they were union. Clyde Dent, I went there. And then I called after that.

Mr. Holden: Did you go in person to the Hyattsville Rug Company?

Mrs. Ecke: Yes.

Mr. Holden: Carpet Craft?

Mrs. Ecke: Yes, in person, on Georgia Avenue. There are two of them, another on 22nd Street. L. C. Harden, South Capitol. The girls that worked with me all spoke for me. They said they would let me know if they heard of any jobs. When you need work you are not going to sit around the house waiting to get it. During the strike I couldn't get around.

Mr. Holden: When did you go to Sloane's?

Mrs. Ecke: That was the first week after I left.

Mr. Holden: Curtis Brothers, when did you go to them?

Mrs. Ecke: I thought maybe they would hire me, but they don't do that work. I just called them up.

Mr. Holden: When?

Mrs. Ecke: Oh, it was during the time I was out.

Mr. Holden: Before the hearing or after?

Mrs. Ecke: Well, I called so many before, I kept trying all the time. I thought if there were any close by I would have a chance to get there.

Mr. Burke: Mrs. Ecke, your lawyer would have us believe that you prepared this list.

Mrs. Ecke: Yes, I did.

Mr. Burke: This is your handwriting?

Mrs. Ecke: Yes, it is.

Mr. Lesser: Just a moment. No, this is not her handwriting. Mrs. Ecke's original list is at home.

Mr. Burke: I object to any remarks by counsel. My question is, is this your handwriting?

Mrs. Ecke: No.

Mr. Burke: This list was just prepared by your son-in-law?

Mrs. Ecke: Yes.

Mr. Burke: This list was prepared a few minutes ago by your son-in-law?

Mrs. Ecke: Yes. I had him call up my daughter.

Mr. Burke: Until your lawyer showed you this, you had never seen the list.

Mrs. Ecke: No.

Mr. Lesser: I would like to interpose an objection because my integrity is being aspersed. I would like the record to show what the facts are. I would like to have the impression left that this list was prepared by my direction. I would like to take the stand and testify -

Mr. Holden: I don't see that there is any necessity for engaging in acrimony. She has said that her son-in-law called her daughter and --

Mr. Lesser: That was at my advice and at my suggestion.

Mr. Holden: It seems to me that this clears you.

Mr. Lesser: I certainly object -

Mrs. Ecke: I had them all down. I didn't think I needed them. So I didn't bring them. I told the lawyer that I had them all.

Mr. Burke: Actually, Mrs. Ecke, you didn't know anything about that list until counsel handed it to you, did you?

Mrs. Ecke: Yes, I had my own list.

Mr. Burke: You mentioned in your testimony that you were only applying to union shops, is that right?

Mrs. Ecke: Yes.

Mr. Burke: You testified now, which you didn't do at the last hearing, that you got in touch with the Hecht Company, Silver Spring Office. Did you go there in person?

Mrs. Ecke: I went there in person.

Mr. Burke: And you didn't tell us that at the last hearing?

Mrs. Ecke: No.

Mr. Burke: Isn't it true that the Hecht Company is a non-union shop?

Mrs. Ecke: They were doing union shop work. I just found out if they had anything to do.

Mr. Burke: You would work for a non-union shop?

Mrs. Ecke: No, I wouldn't. If I found out they were non-union I wouldn't go there. I was in the store and I asked them. Because the union had been doing their work.

Mr. Burke: You called up Carpet Craft?

Mrs. Ecke: I didn't call. I stopped in. On Georgia Avenue.

Mr. Burke: This Carpet Craft you didn't know anything about.

Mrs. Ecke: I called them.

Mr. Burke: This wasn't on your list.

Mrs. Ecke: I have them all on my list.

Mr. Burke: Isn't it a fact that the Carpet Craft Company is non-union?

Mrs. Ecke: I, the girl didn't know. She couldn't tell me.

Mr. Burke: Do you know it now?

Mrs. Ecke: Only what you say.

Mr. Burke: How did you contact the Hyattsville Rug Company?

Mrs. Ecke: By telephone.

Mr. Burke: Was that before August 5th?

Mrs. Ecke: Oh, yes, long before.

Mr. Burke: Isn't it a fact that they are non-union?

Mrs. Ecke: Yes. I don't know. I had to find out myself.

Mr. Burke: Isn't it a fact that you applied to American Floor before you left Mr. Morrissette?

Mrs. Ecke: No, I didn't.

Mr. Burke: Did you apply before you left Mr. Morrissette?

Mrs. Ecke: No. He called me.

Mr. Burke: While you were still working for Mr. Morrissette?

Mrs. Ecke: A couple of weeks after. The girls that were working for Mr. Morrissette called me.

Mr. Burke: He knew all about you, didn't he?

Mrs. Ecke: I don't know. I couldn't say.

Mr. Burke: Mrs. Ecke, who did you say discharged you?

Mrs. Ecke: Mr. Ronnings.

Mr. Burke: Isn't it a fact that he didn't do any hiring or firing?

Mrs. Ecke: He told me since I went back that somebody said he had no authority. He said Mr. Morrissette told him that. He left because it went non-union. He was there a week after I left.

Mr. Burke: Now, Mr. Ronnings, what did he do there?

Mrs. Ecke: Brought the work in. He solicited work.

Mr. Burke: Was he foreman?

Mrs. Ecke: I guess he was.

Mr. Burke: He was just a salesman, wasn't he? He solicited jobs on the street. Mrs. Ecke, you recall during the last hearing you testified that you were not a regular employee with regular hours.

Mrs. Ecke: I didn't testify to that at all. I always had the job and I thought I had a steady job.

Mr. Burke: You did have a steady job in the sense that they only called for you when there was work to do. Do you remember testifying that your work was irregular at the last? We will take you back to January 13, 1955. You didn't leave until June, right? The week ending January 13, 1955 you worked thirty-two hours, according to the records, January 20, forty hours, 27, forty hours, February 3, thirty-two hours, February 10, thirty-two hours, February 17, thirty-two hours, February 24, twenty-four hours. In going down the list you fluctuated from sixteen to forty hours. Isn't it a fact that the reason for that was there wasn't always a full day's work for you?

Mrs. Ecke: That was up to them. They told us they would keep us going as long as they had work.

Mr. Burke: When you left on June 2 -

Mrs. Ecke: I wasn't the only one. The rest were laid off same as me.

Mr. Burke: You actually finally left when Mr. Morrissette told you they were going non-union you could leave if you wanted to.

Mrs. Ecke: No. A couple weeks before that he came in to the shop and said he was going non-union; if we wanted to stay it was up to us. You have to live. Mrs. Snyder said she could get $2.00 an hour.

Mr. Burke: He said you could quit if you wanted to.

Mrs. Ecke: I was fired the week before that. I came back and helped them out.

Mr. Burke: He had a conference with you and said you could stay or leave?

Mrs. Ecke: Right.

Mr. Burke: Isn't it true that there was work available for you and an offer was made to you again on August 4 and just recently?

Mr. Lesser: Please don't answer that question. I would like counsel to separate the questions.

Mr. Holden: He is asking whether work was available.

Mr. Burke: My question is, isn't it a fact you knew there was work available for you at the shop up to the time of the hearing?

Mrs. Ecke: It was non-union.

Mr. Burke: It was available.

Mrs. Ecke: I worked three days and that was all they had.

Mr. Burke: You didn't come back and ask for work?

Mrs. Ecke: No.

Mr. Burke: So, you didn't bother to come back.

Mrs. Ecke: Not when he went non-union.

Mr. Burke: It's a fact that you were informed on August 4 at the hearing they needed you and work was available.

Mrs. Ecke: You mean the three days I went out?

Mr. Burke: At the hearing on August 4 and you didn't bother to come back. Isn't it a fact on August 8 you received this letter from Mr. Morrissette telling you he had work for you and would like to have you?

Mrs. Ecke: He was still non-union.

Mr. Burke: I say to you again as to this moment if you were needed at the shop you still would not go to work.

Mrs. Ecke: Not non-union.

Mr. Lesser: Section 10(d) of the statute--

Mr. Burke: I didn't interrupt counsel when he was examining the witness. If there is anything to argue we can do it after I finish.

Mr. Holden: I will give you the whole week next week.

Mr. Lesser: I am willing to close the hearing at this point.

Mr. Burke: Mrs. Ecke, you mentioned you were called in because some lady had a sore finger that first week. As a matter of fact that lady had that sore finger back in April.

Mrs. Ecke: She was out a few days and she said to me, "I thought you were through" and I said, "They asked me to come out."

Mr. Burke: Wasn't it just a part of the routine?

Mrs. Ecke: No.

Mr. Holden: Do you want to ask her any more questions?

Mr. Burke: One more thing. Mrs. Ecke, you testified American Floor got in touch with you and offered to give you a job if you waited until September first and isn't it a fact that you were waiting for that job?

Mrs. Ecke: No, they told me there wouldn't be any work until the first of September.

Mr. Burke: All your friends had gone to work with American Floor, hadn't they?

Mrs. Ecke: That wouldn't make any difference to me. I would rather work somewhere else. That is way over on Central Avenue. I have a far way to go.

Mr. Holden: Did you want to put on any defense?

Mr. Burke: Frankly, just a moment--frankly, I think everything that was said today was said at the other hearing, with the exception of some of the testimony and I think I can resolve that by any argument. You have heard Mr. Morrissette's testimony as to offering her the job and why she quit. His testimony is exactly the same as it was. The only thing he would want to add and we will go on record on that point right now, he has had and does have to this day more than enough work for this lady. He said he still had that condition up to the date of the previous hearing.

Mr. Holden: Ask him if he still has since all this.

Mr. Burke: You sent that letter to Mrs. Ecke on August 8th offering employment. Has the situation changed any?

Mr. Morrissette: No.

Mr. Burke: Have you had employment for her and let her know it?

Mr. Morrissette: Yes.

Mr. Holden: One question I would like to ask. These offers that you made, did you offer her the same wages and hours as the union?

Mr. Morrissette: I so stated in that letter.

Mr. Holden: I mean before this letter?

Mr. Morrissette: Yes, sir.

Mr. Holden: At the other hearing I believe there was some discrepancy between the union scale and what you offered her.

Mr. Morrissette: No, sir, none whatsoever. I will say this--

Mr. Holden: At the time there was a prevailing rate and Mr. Blackburn suggested that there had been a change in the rate between the time she left and now. Did you offer her a job at the new rate?

Mr. Morrissette: We didn't spell it out. We said the same condition.

Mr. Burke: The employment available to her was on the same scale she had always worked for or is working for now.

Mr. Holden: Do you operate it now as a union shop, Mr. Morrissette?

Mr. Morrissette: No.

Mr. Lesser: Do you have currently a collective bargaining agreement?

Mr. Burke: I would like counselor to restrict himself to the question.

Mr. Holden: The question was whether he offered union wages. He said he did.

Mr. Lesser: Well, I correct my question. Do you have a collective bargaining with the Union? Do you know what the union scale of wages is right now for rug seamstresses?

Mr. Morrissette: Not all of them.

Mr. Lesser: Are you obliged to pay it?

Mr. Burke: I don't think that is pertinent to the question. We have testified that we are a non-union shop.

Mr. Holden: But she was offered the same scale as she worked before.

Mr. Lesser: But not the prevailing union standard. Please answer my question.

Mr. Morrissette: Do you want to know what it would be if she went to work now?

Mr. Lesser: Was your offer to Mrs. Ecke for wages which are the same as the current union scale wages?

Mr. Morrissette: Which offer are you referring to now?

Mr. Lesser: The offer that has been made.

Mr. Holden: He has testified to four or five offers. Which one do you want?

Mr. Lesser: The one before August 4th, subsequent to August 4th. Let's take each one separately. At the last hearing did you specify that the amount was you would pay her?

Mr. Morrissette: No.

Mr. Holden: He said he would pay her the union scale.

Mr. Lesser: Did you mean the then prevailing union scale?

Mr. Morrissette: As I knew it.

Mr. Lesser: You know now that was not the same figure you had in mind. After you learned what the scale really was, were you willing to pay the union scale?

Mr. Morrissette: No, I didn't spell it out, except as shown by this letter here.

Mr. Lesser: I would like to ask--again in the words of the statute--and to that extent I am willing to make this witness my witness. Counsel, do you have any agreement with the union to operate a union shop?

Mr. Burke: No.

Mr. Holden: Well, he finally got his answer to that question. Mr. Morrissette, have you had any labor dispute in your business?

Mr. Morrissette: None whatsoever.

Mr. Holden: When this lady left it was not because of any labor dispute?

Mr. Morrissette: None whatsoever. I think we are all on good terms.

Mr. Holden: Is that all now?

Mr. Lesser: That's all.

Mr. Burke: If it is counsel's desire to sum up, I would like to insist on my prerogative to close.

Mr. Lesser: I have no objection to that. I have no summation to make.

Mr. Burke: I would like to make a brief statement. I shall be most brief. I am sure that having heard these many _____ your memory is much clearer than mine. I am sure you will agree that everything that was testified to today was testified to at the last meeting with the exception of the altered pieces of testimony and from the preparations of this statement by the son-in-law causing someone to telephone and having firms listed on the paper that she wasn't familiar with. It was obvious that you asked her not just once but several times whether she had contacted or _____ she testified she called two concerns and that is all and they gave as an excuse that she couldn't get around on account of the strike. My impression is she called - if your recollection is she visited I will stand corrected. That hearing lasted a considerable period of time. If she had any recollections she had every opportunity. Suddenly and without any excuse whatsoever other than her statement that she was cut off abruptly, that was an untruth, she now tells us that she contacted and listed ten firms. I submit she can be mistaken about one or two, but not about eight. And according to her, there were eight or ten firms. This is an informal hearing and the Appeals Examiner bases his judgment on the general testimony regardless of the formal rules of evidence. By a very well established rule of evidence, I think you should take in mind if a witness can testify - I will say falsely - about any one statement, she can testify falsely about any statements and I submit the true testimony she gave is the first testimony and your order should be affirmed.

Mr. Lesser: If the Appeals Examiner pleases, I object to the implication that Mrs. Ecke has falsified her testimony. Although I was not here at the other hearing, I think looking at the transcript of the hearing will indicate that there was no difference in the testimony, but will sub-

stantially amplify the facts which she did not have an opportunity to bring out. Mrs. Ecke was undoubtedly both surprised at the adverse nature of it and at the extent to which the employer in this case is opposing Mrs. Ecke's claim. She did not realize there would be such opposition. She did not realize she would have to contend with counsel. Her son-in-law who attended the hearing was not permitted to speak. Her son-in-law could have counseled her on the subject and prevented her from going on long stories. He was not permitted to offer counsel during the hearing. Subsequent to this hearing Mrs. Ecke came to me full of complaint and very unhappy at the fact that she did not have an opportunity to tell the true story because she knew well at the time that her search for work was unceasing since she lost her job and she felt certain the full story had not been brought out. I understand the bulk dealt with the union question which is secondary in this case. I think the facts indicate that Mrs. Ecke was invited to leave and was told to leave the following week, was called back to replace somebody with a sore finger for three days. At that time the shop went non-union. The employer suggested it would be better for her not to continue working. Mr. Morrissette, I understand, indicated he did not want her to get into trouble with the union. No offers were made that she knew of until this last hearing when an oral offer was made to take her back and until this letter concerning the offer to take her back. I respectfully direct the Examiner to section 10(d) of the statute which provides that a claimant is not required to accept work in a non-union shop. It is clearly specified in the statute and I do not believe she can be denied because she refused to work in the non-union shop.

Mr. Holden: The statute does not say that.

Mr. Lesser: I construe it to that effect.

Mr. Holden: It says she is not required to accept a job which will compel her to join a union. It was testified that they would be liable to a fine and loss of membership, but not automatically lose it. The union could eject her or fine her, but the union might not have done that. They can -- it is up to the union, what they want to do. Isn't that right, Mr. Blackburn?

Mr. Blackburn: I tried to give the impression that she might not be caught. But if caught she would lose her membership.

Mr. Holden: If she accepted a non-union job it would be tantamount to resigning from her union.

Mr. Blackburn: Yes, sir. I might eject myself into it. There isn't an opportunity to resign for the purpose of violating a trade union.

Mr. Holden: A member can resign any time he wants to.

Mr. Blackburn: He can resign after taking some other kind of employment outside of the trade which the union covers. But they can't resign for the purpose of violating the trade rules. They can't do that. They can't resign from the union and then go out and work in a non-union shop. They would have an awful time getting back into the union.

Mr. Holden: Of course, as a free American citizen you can resign, but they would have a hard time getting back in the union.

Mr. Blackburn: Right.

Mr. Lesser: I submit further that fairly appraised the evidence indicates that she did not voluntarily resign under circumstances that _____. She was diligent in her work search during her period of unemployment.

Mr. Burke: I just want to correct, I am not going to argue. I merely want to correct a statement. Counsel stated Mrs. Ecke's son-in-law stated that he did not have an opportunity to testify, but he did testify.

Mr. Lesser: He didn't know anything about the case.

Mr. Burke: Then counsel shouldn't make that statement.

DISTRICT UNEMPLOYMENT COMPENSATION BOARD

In re: CLAIM OF IDA H. ECKE

Decided January 24, 1956

Before Spencer, Lane, McLaughlin, Preller and Brahany, Members of the District Unemployment Compensation Board

APPEAL from the Appeals Examiner of the District Unemployment Compensation Board. Reversed.

PHILIP J. LESSER for the claimant

MILTON M. BURKE for the employer

BY THE BOARD:

The claimant, Ida H. Ecke, for some time was employed by the Eareckson Rug Company which laid her off on about May 30, 1955, because they did not have sufficient work. Shortly thereafter, the claimant was called back to work by that company and remained there until June 16, 1955, at which time the President of the company announced that it would no longer operate a union shop but that in the future it would operate an open shop and that all of its employees were free to remain or to quit as they saw fit. The claimant quit and commenced refiling claims for unemployment compensation with this Board and a Claims Deputy of this Board ruled that the claimant voluntarily left her most recent employment without good cause and was disqualified from receiving benefits from June 12, 1955 through July 16, 1955, and that her entitlement to benefits in the current benefit year should be reduced by five times her weekly benefit amount which was $150.00. From the decision allowing benefits subject to the disqualification, both the employer and claimaint appealed. The Appeals Examiner modified the decision of the deputy and ruled that the claimant was not available for work from the date of the original claim until August 5, 1955, but made no decision on the claimant's voluntarily leaving. From this decision, the claimant appealed to this Board. The decision was set aside and the case was remanded by this Board with instructions for the Appeals Examiner to take additional testimony on the question of availability for work. An additional hearing was held by the Appeals Examiner and a decision was rendered that the claimant was not subject to a disqualification for voluntarily quitting her most recent employer without good cause because of the provisions of Section 10(d)(3) of the District of Columbia Unemployment Compensation Act (herein after called the Act) which reads as follows:

> "Benefits shall not be denied to any otherwise eligible individual for refusing to accept new work under any of the following conditions: * * * (3) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization."

At the same time the Appeals Examiner ruled that the claimant was not available for work from the date of her original claim until August 5, 1955 because she had not actively sought work and was accordingly ineligible for benefits during that period. From this decision the claimant appealed to this Board contending that she had actively sought work from the date of her original claim until August 5, 1955, and the employer appealed from the decision upon the ground that Section 10(d)(3) of the Act did not apply and that the claimant was subject to a disqualification for voluntarily leaving under the provisions of Section 10(a) of the Act. The employer also contended that at all times it had a job open for the claimant. The employer took the position that Section 10(d)(3) applies to conditions for employment established by the employer and not to conditions set up by the union or some third party. To the employer's contention, the claimant answered, first, that she did not quit but was discharged and second, that even in the event that it was found that she had quit that Section 10(d)(3) supra applied. The claimant contends that Congress did not necessarily intend the Section to apply to conditions of employment established by the employer but to conditions also established by the union and as she would have been subject to expulsion from the union if she had remained with the employer that the said Section applied.

A careful study of the testimony discloses that the claimant left the service of this employer on June 16, 1955, after its President had announced that it would no longer operate a union shop but would operate an open shop. The claimant was free to remain with the employer at this time but left rather than take a job which might subject her to disciplinary action by her union. After a careful study of the law and the authorities, this Board is of the opinion that Congress intended Section 10(d)(3) only to apply to conditions established by the employer. There have been several court cases in which the same issue has arisen with respect to statutory provisions identical to Section 10(d)(3). In all of these cases the courts interpreted the statutory provisions as applying only to conditions established by the employer. Bigger v. Delaware Unemployment

Compensation Commission, 43 Del 553, 53 A (2d) 761; Chambers v. Owens-Ames-Kimball Company et al, 146 O. S. 559, 67 N. E. (2d) 439; Barclay White Company v. U. C. Bd of Rev. 356 Pa. 43, 50 A. (2d) 336, Cert. Denied 332 U. S. 761. Accordingly, the claimant is disqualified from receiving benefits from June 12 through July 16, and her maximum entitlement to benefits is reduced by the sum of $150.00. Mr. Preller dissented from this finding.

The question remains as to whether the claimant was available for work and eligible for benefits from the date of her original claim until August 5. The record shows that during this entire period a transit strike was going on in the District of Columbia. The efforts of the claimant to obtain work were necessarily hampered by the lack of transportation facilities. The Board is of the opinion that in view of the transit strike this claimant actively sought work during the period in question to the extent that a reasonable individual would have done in like circumstances. Accordingly, the Appeals Examiner's ruling under Section 9(d) of the Act that the claimant was not available for work and was thus not eligible for benefits from the date of her original claim until August 5, 1955, is overruled. Mr. McLaughlin did not vote on this finding.

PRELLER, Board Member, dissenting:

I am of the opinion that the claimant did not voluntarily quit by leaving her employment with the Eareckson Rug Company in the first instance but was constructively discharged when that company went from a union shop to an open shop. The claimant had no choice but to resign as she would have lost her union benefits which had been established over a period of years and would have undoubtedly been discharged from the union had she remained with the employer. Furthermore, I am of the opinion that Congress did not intend Section 10(d)(3) of the Act to apply only to conditions set out by the employer but also intended this Section to apply to situations as in the present instance. I am of the opinion that Congress intended it to apply whenever accepting a job or continuing on a job would in effect cause the loss of union status. The union rule involved

is one of long standing, is reasonable and is one of the cornerstones of successful union operations. Any other interpretation of this Section would not be realistic and accordingly I dissent from my fellow Board Members on the question of disqualification. However I am of the opinion that the claimant did what any reasonable individual would have done in her circumstances and concur with the majority on the finding that she was available for work.

BRIEF FOR APPELLEE AEM, INC.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
District of Columbia Circuit
FILED MAY - 5 1958
Joseph W. Stewart
CLERK

No. 14,307

IDA H. ECKE,

Appellant,

v.

DISTRICT UNEMPLOYMENT COMPENSATION BOARD

and

AEM, INC.,

Appellees.

No. 14,308

AEM, INC., t/a S. GROOME EARECKSON,

Appellant,

v.

IDA H. ECKE, et al.,

Appellees.

APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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Washington, D. C. ROBERT I. THIEL Printer EX 3-0625

STATEMENT OF QUESTIONS

The questions presented are:

(a) Whether an employee who is a member of a union shall be considered to have voluntarily left work without good cause within the meaning of the District Unemployment Compensation Act when her reason for leaving was that her employer had become a non-union shop.

(b) Whether such employee refused, without good cause, to accept the same type of work, within the meaning of the District Unemployment Compensation Act, when the reason for her refusal was that the employer was non-union.

INDEX

	Page
PRELIMINARY STATEMENT	1
COUNTER-STATEMENT OF THE CASE	2
CONSTITUTUION, STATUTES AND REGULATIONS INVOLVED	4
SUMMARY OF THE ARGUMENT	6
ARGUMENT	8
Authorities	10
CONCLUSION	13

TABLE OF CASES

Barclay-White Co. v. Unemployment Compensation Board, etc., 356 Pa. 43; 50 A 2d 336	11
Bigger v. Unemployment Compensation Commission, 43 Del. 553, 53 A 2d 761	11, 12
Chambers v. Owens-Aines-Kimball Co., et al., 146 O.S. 559, 67 N.E. 2d 439	10
National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30	12
Stromberg v. California, 283 U.S. 359	12
United States v. Shreveport Grain and Elevator Co., 287 U.S. 77	12
W. H. H. Chamberlin, Inc. v. Andrews, 271 N.Y. 1, 2 N.E. 2d 22	12

CITATIONS

Constitution of the United States

Fifth Amendment 4

Statutes and Regulations

Title 46, District of Columbia Code, 1951 Edition
(District of Columbia Unemployment Compensation Act)

Section 310(a) (Section 10(a) of the Act) 3, 4, 8, 9

Section 310(c) (Section 10(c) of the Act) 4, 5, 8, 12, 13

Section 310(d) (Section 10(d) of the Act) 3, 4, 5, 6, 7, 9, 11, 12, 13

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APPEAL FROM AN ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE AEM, INC.

PRELIMINARY STATEMENT

The District Unemployment Compensation Board and AEM, Inc., are both in complete agreement as to the decision, and the authorities supporting the same, in connection with Appeal No. 14,307 which was

consolidated with Appeal No. 14,308 for purposes of filing briefs and joint appendix and for hearing. Appellee, AEM, Inc., and Appellee, District Unemployment Compensation Board, however, oppose each other in Appeal No. 14,308. The position taken by Appellee, AEM, Inc., as to Appeal No. 14,308, is that the decision of the District Unemployment Compensation Board on the subject matter involved in Appeal No. 14,308 is completely inconsistent with its decision in Appeal No. 14,307. As to Appeal No. 14,307, Appellee, AEM, Inc. adopts all of the authorities and the argument of Appellee, District Unemployment Compensation Board.

COUNTER-STATEMENT OF THE CASE

Appellant, Ida H. Ecke, hereinafter referred to for convenience as Ecke, was employed by the Appellee, AEM, Inc., doing business as S. Groome Eareckson, a rug repair and servicing company, hereinafter referred to for convenience as Eareckson, as a seamstress, by the hour and on a call basis (J.A. 18). There is a difference of opinion on whether Ecke was laid off because there was not sufficient work for her on or about May 30, 1955, and shortly thereafter called back to work (J.A. 19). The position of Eareckson was that Ecke had always worked on a call basis as needed, but that, by and large, she averaged around $50.00 per week over the course of time (J.A. 18). The President of AEM, Inc. had testified that Ecke did not have to report at a certain time every morning, but that she was told from time to time to come in as needed and that her salary, as a rule, ranged from $23.00 to as high as $55.66 per week. On or about June 9, 1955, Ecke filed a claim for unemployment compensation with the District Unemployment Compensation Board, hereinafter referred to for convenience as the Board, (J.A. 26). On June 16, 1955, Eareckson informed all of its employees, including Ecke, that it would commence to operate an open shop but that the conditions of employment would be the same as they had been in the past and that all of its employees were free to remain in their respective

jobs or to leave as each might elect (J.A. 16, 17, 19, 23). Ecke immediately left her employment with Eareckson and commenced filing claims for compensation with the Board (J.A. 19, 21, 22, 27). A Hearing Officer of the Board ruled that Ecke voluntarily left her most recent employment without good cause and disqualified her from receiving benefits from June 12, 1955, through July 16, 1955, which amounted to the sum of $150.00 (J.A. 49). This action was taken under Title 46, Section 310(a) of the District of Columbia Code (Section 10(a) of the District of Columbia Unemployment Compensation Act, hereinafter referred to as the Act). From the decision allowing benefits subject to the above disqualification, both Eareckson and Ecke appealed (J.A. 15). The Appeals Examiner of the Board modified this decision and ruled that Ecke was not available for work from the date of her original claim until August 5, 1955, and thus not eligible for benefits during that period. From this decision, Ecke appealed to the Board. The decision was set aside and the case was remanded by the Board to the Appeals Examiner to take additional testimony (J.A. 49). Another hearing was held by the Appeals Examiner at which time a decision was rendered that Ecke was not subject to a disqualification for voluntarily quitting her most recent employment without good cause under the provisions of Title 46, Section 310(d)(3) of the District of Columbia Code, Section 10(d)(3) of the Act. This time the Examiner ruled that Ecke was not available for work from the date of her original claim until August 5, 1955, because she had not actively sought work and was ineligible during that period. Both Ecke and Eareckson appealed to the Board, Ecke claiming that she had actively sought employment and Eareckson claiming that her leaving Eareckson's employment was voluntary under Section 10 of the Act and that she should be disqualified from receiving compensation. Eareckson also contended that, at all times, it had a job open for Ecke which had been offered her on numerous occasions. Although these offers were made in the form of a letter which does not appear in the record, there is substantial evidence of this in the record and the offers were repeated in several of the pleadings of AEM, Inc. (J.A. page 5, lines 4, 5, 6, 7

and 8, pages 18, 44 and 50).

The Board (page 49 et. seq. J.A.) rendered its decision on the two appeals to the effect that Ecke did leave her employment voluntarily without good cause under Section 10(a) of the Act, and was not excused under Section 10(d)(3) of the Act, and disqualified Ecke from receiving benefits from June 12 through July 16, 1955, in the potential amount of $150.00. The Board in like manner ruled that Ecke was available for work and eligible for benefits after July 16, 1955, stating that she had exercised due diligence in seeking employment. There followed, a suit in the United States District Court for the District of Columbia by Ecke and a cross-claim by Eareckson, in the nature of cross-appeals, (J.A. 1, 3). On motions for summary judgment, joined in by all parties, the suit and cross-claims were dismissed. Ecke and Eareckson noted the two appeals in question.

CONSTITUTION, STATUTES AND REGULATIONS INVOLVED

Constitution of the United States

Article 5:

> "No person shall . . . . be deprived of life, liberty, or property, without due process of law; . . . ."

Sections 10(a), 10(c), and 10(d) of the District of Columbia Unemployment Compensation Act

Section 10(a) of the Act:

> "An individual who has left his most recent work voluntarily without good cause, as determined by the Board under regulations prescribed by it, shall not be eligible for benefits with respect to the week in which such leaving occurred and with respect to not less than four nor more than nine consecutive weeks of unemployment which immediately follow such week, as determined by the Board in such case according to the seriousness of the case. In addition such individual's total benefit amount shall be reduced in a sum equal to the number of weeks of disqualification multiplied by the weekly benefit amount."

Section 10(c) of the Act:

"If an individual otherwise eligible for benefits fails, without good cause as determined by the Board under regulations prescribed by it, either to apply for new work found by the Board to be suitable when notified by any employment office or to accept any suitable work when offered to him by any employment office, his union hiring hall, or any employer direct, he shall not be eligible for benefits with respect to the week in which such failure occurred and with respect to not less than four nor more than nine consecutive weeks of unemployment which immediately follow such week, as determined by the Board in such case according to the seriousness of the refusal. In addition such individual's total benefit amount shall be reduced in a sum equal to the number of weeks of disqualification multiplied by the weekly benefit amount. In determining whether or not work is suitable within the meaning of this subsection the Board shall consider (1) the physical fitness and prior training, experience and earnings of the individual, (2) the distance of the place of work from the individual's place of residence, and (3) the risk involved as to health, safety, or morals."

Section 10(d) of the Act:

"Benefits shall not be denied to any otherwise eligible individual for refusing to accept new work under any of the following conditions: (1) if the position offered is vacant due directly to a strike, lock-out, or other labor dispute; (2) if the wages, earnings, hours, or other conditions of the work offered are less favorable to the individual than those prevailing for similar work in the locality; (3) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization."

SUMMARY OF THE ARGUMENT

I

The facts show that Ecke voluntarily left her employment with Eareckson because he had declared that in the future he was going to operate an open rather than a union shop. Ecke stated she left because she feared disciplinary action by her union if she worked in an open shop. The Board properly assessed Ecke the minimum disqualification allowed by law for voluntary leaving without good cause. In making its decision the Board properly followed the decision of the highest courts of four states in an analogous situation. These courts held that a union member did not have good cause for refusing otherwise suitable work when the sole reason for such refusal was that the union member feared disciplinary action if she worked in an open shop.

II

The Unemployment Compensation Act is not class legislation but was enacted for the benefit of the general public and not for union members as a class. In making decisions under the Act and its Regulations the Board must make uniform decisions for all individuals without regard to their affiliation with a labor organization.

III

Section 10(d) of the Act is not applicable as this is a case of voluntary leaving and the section applies solely to offers of new work. In addition, the plain meaning of the section is that the condition requiring the individual to resign from a labor organization must be imposed by the job itself. An indirect result of a union rule does not constitute a condition of the job. A different construction of this section might result in its being declared unconstitutional and the courts favor a construction which would result in the constitutionality of a law rather than one that would result in its unconstitutionality. Where the

wording of a statute is clear and unambiguous and where it does not lead to absurd results, resort to the legislative history should not be necessary. In addition, the legislative history of the provision in question is not clear.

Section 10(d) must be considered in connection with Appeal No. 14, 308 in that Ecke refused the continual offers of employment made by Eareckson and such refusal appeared to be solely on the grounds that Eareckson had become non-union. Section 10(d) of the Act would not justify Ecke's refusal to accept such employment.

IV

The cases cited by Ecke are not in point, most of them having no analogy at all but contain generalities that do not fit the case. The only cases having any similarity are three cases involving the availability of Seventh Day Adventists for work when they refuse to work on their Sabbath. These cases involve the proposition of whether or not working on their Sabbath would be damaging to their morals, when it violates a tenet of their faith. This is much different than an individual ignoring a rule of an organization which was formed for his financial well-being and not for his moral or spiritual well-being.

V

While the Act was not designed to freeze and individual permanently on a job with an employer and one leaving a job because of a reason not deemed good cause by the Board but for a reason which was not whimsical should not be penalized more than once for the same decision, nevertheless, the Act was designed to assist the needy who are unable to find employment and the compensation paid is being paid out of a reserve belonging to the employer. Under such circumstances, when the same employment is continually available, it no longer becomes a case of punishing an employee more than one time for the same act, but rather, a case of refusing to compensate the employee, as a subject of unemployment, when suitable employment is available to such employee.

ARGUMENT

The question before this Court is whether or not an employee is entitled to draw unemployment compensation under the provisions of the District of Columbia Unemployment Compensation Act if she refuses available employment identical to her prior employment or if she leaves her employment merely because accepting or continuing in such employment might result in either her expulsion from the union or possibly other disciplinary action against her. The issue must be decided strictly on the interpretation of the provisions of the aforesaid Act, and not on the social problems incident to the relationships between labor unions and industry. The only Sections of the District of Columbia Unemployment Compensation Act, hereinafter referred to as the Act, which the Board could consider in its deliberations are:

Section 10(a)

> "An individual who has left his most recent work voluntarily without good cause, as determined by the Board under regulations prescribed by it, shall not be eligible for benefits with respect to the week in which such leaving occurred and with respect to not less than four nor more than nine consecutive weeks of unemployment which immediately follow such week, as determined by the Board in such case according to the seriousness of the case. In addition such individual's total benefit amount shall be reduced in a sum equal to the number of weeks of disqualification multiplied by the weekly benefit amount."

Section 10(c)

> "If an individual, otherwise eligible for benefits fails, without good cause, as determined by the Board under regulations prescribed by it, either to apply for new work found by the Board to be suitable when . . . . offered to him by an employment office, his union hiring hall, or any employer direct, he shall not be eligible for benefits with respect to the week in which such failure occurred and with respect to not less than four nor more than nine consecutive weeks of unemployment which immediately follow such week,

as determined by the Board in such case according to the seriousness of the refusal. In addition such individual's total benefit amount shall be reduced in a sum equal to the number of weeks of disqualification multiplied by the weekly benefit amount. In determining whether or not work is suitable within the meaning of this subsection the Board shall consider (1) the physical fitness and prior training, experience and earnings of the individual, (2) the distance of the place of work from the individual's place of residence, and (3) the risk involved as to health, safety, or morals." (Underscoring added.)

Section 10(d)

"Benefits shall not be denied to any otherwise eligible individual for refusing to accept new work under any of the following conditions: (1) . . . . . (2) . . . . . (3) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization."

Ecke has apparently relied on Section 10(d)(3) to support her claim under Section 10(a).

It is the position of the employer that the word 'condition' in Section 10(d)(3) is intended and means requirement by the employer rather than result. There is no evidence whatsoever, nor is it so contended by the claimant, that the employer, as a condition to her continued employment for him or her acceptance of employment with him, was required to join a company union, to resign from her union, or to refrain from joining any labor organization. On the contrary, her argument is that even though the employer did not place any of these conditions on her, the result or consequence of her continued employment with the employer or her acceptance of new employment there or with any other non-union shop would be her possible expulsion from the union or possible disciplinary action against her, and that this is in fact a requirement that she resign from the union. The fallacy in this argument is that instead of being guided by the law the employer would then be controlled by the whim or caprice of a labor union as so ably argued by

the Supreme Court of Ohio in the authorities hereinfurther cited. If a labor union should decide that its employees cannot work for an employer who engages individuals who have not lived in the District of Columbia for more than two years, or people of the non-caucasian race, or people wearing glasses, or others then, under such interpretation, the union employee voluntarily leaving her employment would be entitled to unemployment compensation. Furthermore, it establishes an entirely different standard for union members than for non-union members in their rights to unemployment compensation. A non-union member of this employer would not be entitled to compensation while a union member would be entitled to such. If Congress had intended that persons in the category of the claimant be entitled to compensation it certainly could have provided for such by a direct provision in the Act, and the mere fact that such provision is not contained in the Act is adequate proof that Congress did not wish to delegate authority to labor unions through their rules and regulations.

Authorities

To begin with, there has never been an adjudication of this question in the District of Columbia so far as is known to the employer. There is, however, a landmark case, which covers the question thoroughly, particularly because of the similarity of facts, that there can be no other constitutional or rational conclusion. Chambers v. Owens-Aines-Kimball Co., et al., 67 N.E. 2d 439, 146 O.S. 559, decided by the Supreme Court of Ohio, May 22, 1946. In this case the court ruled that "unemployed union member lost his right to unemployment compensation benefits because of refusal to accept tendered employment on non-union job, notwithstanding that under rules of his union working on such job would have made him subject to fine, suspension, or expulsion from the union". In this case, the Ohio Bureau of Unemployment Compensation disallowed the compensation on the above described grounds; its decision was affirmed by the Court of Common Pleas then reversed by the Court of Appeals which in turn was reversed by the Ohio Supreme

Court reinstating the decision of the Unemployment Compensation Board denying the compensation. It is noteworthy that the Ohio Act is even stronger than the District of Columbia Act in that the first part of the Ohio Act is identical with our Sec. 10(d)(3) but added to this is "or would be denied the right to retain membership in and observe the lawful rules of any such organization."

The Ohio Supreme Court in its opinion states: "The word 'condition' refers to restrictions and qualifications contained in the offer of employment made by the employer to the prospective employee, and that it should not be interpreted to mean the 'result' of being so employed, as contended by claimant. In other words, if, as in the present case, the offer of work is unconditional, the employee cannot justify his refusal thereof for the sole reason that his acceptance of said work would result in disciplinary action by his union. In our opinion, the Legislature did not intend to delegate to labor unions, through the medium of their rules and regulations, the power and authority to determine that a member should not accept a referral to work and thereby qualify such member for unemployment compensation to which he would otherwise not be entitled because of the refusal of such a referral. In the phrase 'as a condition of being so employed' the word 'condition' is the equivalent of 'requisite' or 'requirement'. In legal signification, the term 'condition' denotes something attached to and made a part of a grant or privilege. Although it might be desirable under certain conditions not to require a claimant to accept work if it might result in his expulsion by his labor organization or lesser disciplinary action against him nevertheless expulsion is a result and not a condition of being employed."

Of like opinion to that of the Ohio Supreme Court are the Supreme Court of the State of Delaware, Bigger v. Unemployment Compensation Commission, etc. 53 A 2d 76, commencing at page 761, 43 Del. 553, and the highest Court of Pennsylvania in Barclay-White Co. v. Unemployment Compensation Comm.etc.50 A 2d 339, commencing at page 336, 356 Pa. 43. Both the Delaware and Pennsylvania decisions are in full

agreement with the Ohio Supreme Court decision, citing the same as authority. In the Bigger case the court states: "The fact that unemployed painter would have been subject to a penalty by his union, if he had accepted new work offered him by the Employment Service, did not justify his refusal to accept the new work under the provisions of the Unemployment Compensation Act that benefits under the Act shall not be denied for refusal to accept new work, if, as a condition of being employed, individual would be required to join in company union, or resign or refrain from joining any bona fide labor organization." The requirement of the Pennsylvania Act is identical to that of the District of Columbia Act.

The only possible contrary decision is that of New York, in the case of W. H. H. Chamberlin, Inc. v. Andrews, 271 N.Y. 1, 2 N.E. 2d 22. In this case there was an affirmance only because of equal division of the Court which automatically affirms. Further, in this case the Act contained a provision which covered a result rather than a condition in that in addition to the provisions contained in Sec. 10(d)(3) it contained the additional provisions as follows: "accepting such employment would interfere with his joining or retaining membership in a labor organization". The District of Columbia Act obviously did not contain such a provision by specific intent of Congress.

Finally, it is well established that such interpretation of a Statute will be favored which gives it the greater chance of surviving the test of constitutionality. There are numerous decisions on this point among which are: Stromberg v. California, 283 U.S. 359; United States v. Shreveport Grain and Elevator Co., 287 U.S. 77; National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30.

Section 10(c) is to be considered in rebuttal to the argument of Appellee, District of Columbia Unemployment Compensation Board, in reply to the appeal of Eareckson in Appeal No. 14,308. If the Board and subsequently the United States District Court for the District of Columbia found that Ecke had no legal justification or excuse for leaving

the employment of Eareckson on the mere ground that she might be suspended from her union or be otherwise disciplined, then they must find that she had no right under Section 10(c) of the Act, to refuse employment from Eareckson, which employment was continually available to her. The ruling of the Board and the District Court, which sustained the Board, was to the effect that the penalty for her failure to continue in her employment was the loss of a certain number of weeks compensation. The position of Eareckson is not that the employee, Ecke, should be penalized, but that such employee is not unemployed since the very same job which she has always held is still continually available to her. The record is replete with continuous offers of employment under the same conditions and on the same basis as she had prior to her quitting. Since the creation of the Act was for the simple and exclusive purpose of aiding the unemployed, on what basis would compensation be permitted to be paid to Ecke out of the employer's reserve when the employment is available to the employee whenever the employee chooses to work? The principle in Appeal No. 14,308 is that simple.

CONCLUSION

It is therefore the conclusion of the employer that a finding for the claimant would result in an interpretation of Section 10(d)(3) of the District of Columbia Unemployment Compensation Act which would violate the Fifth Amendment of the United States Constituion. The right of a claimant must not depend upon union or non-union status. Unemployment compensation is based upon the philosophy that employment and not unemployment is the goal to be attained; that payments are always limited to persons who are involuntarily unemployed; and that Labor, as well as industry, must cooperate in all reasonable measure in the proper administration of the law.

It is respectfully submitted therefore that the claimant, by her own admission, had employment available to her at all times identical to her customary employment and her failure to continue in such work or her voluntary refusal to accept the same disqualifies her from receiving unemployment benefits under the District Unemployment Compensation Act.

Respectfully submitted,

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AEM, Inc.

BRIEF FOR APPELLEE
DISTRICT UNEMPLOYMENT COMPENSATION BOARD

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,307

IDA H. ECKE, *Appellant*,

v.

DISTRICT UNEMPLOYMENT COMPENSATION BOARD

and

AEM, INC., *Appellees*.

United States Court of Appeals
For the
District of Columbia Circuit
FILED
APR 28 1958
Joseph W. Stewart
CLERK

No. 14,308

AEM, INC., t/a S. GROOME EARECKSON, *Appellant*,

v.

IDA H. ECKE, *Appellees*.

APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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JOSEPH NOTES

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STATEMENT OF QUESTIONS PRESENTED

In the opinion of this Appellee the questions are:

In Number 14,307

(a) Whether a union member be deemed to have voluntarily left work without good cause, within the meaning of the District Unemployment Compensation Act, when the reason for her leaving was that her employer had changed from a union to an open shop;

In Number 14,308

(b) Whether an individual who has elected the partial loss of unemployment insurance rather than the possible loss of union benefits should be forced to make this choice again and again during the entire course of her claim for unemployment insurance?

INDEX

Subject Index

	Page
PRELIMINARY STATEMENT	1
COUNTER-STATEMENT OF THE CASE	2
CONSTITUTION, STATUTES, AND REGULATIONS INVOLVED	4
SUMMARY OF THE ARGUMENT	10
ARGUMENT	13
I. Ecke Voluntarily Quit Without Good Cause	13
II. Unemployment Compensation Act Not Class Legislation	15
III. Ruling Of The Board Is Correct	17
IV. Section 310(d) Is Not Applicable	18
V. Cases Cited By Ecke Not In Point	24
VI. As To Eareckson	28
CONCLUSION	29

AUTHORITIES

Cases Cited

Barclay-White Co. v. Unemployment Comp. Bd. of Rev., 356 Pa. 43; 50 A 2d 336; cert. denied 332 U. S. 761	14, 16, 18, 20, 21
Bigger v. Unemployment Comp. Comm., 43 Del. 553, 53 A 2d 761	14, 18, 20
Cabell v. Markham, 148 F. 2d 737	25
Caminetti v. United States, 242 U. S. 470, 37 S. Ct. 192, 61 L. E. 442	22, 25
Carmichael v. Southern Coal & Coke Company, 301 U. S. 495, 57 S. Ct. 868, 81 L. E. 1245	15
Chambers v. Owens-Ames Kimball Co., 146 O. S. 559, 67 N. E. 2d 439	14, 18
Donnelly Garment Company v. Keitel, 354 Mo. 1138, 193 S. W. (2d) 577	15, 21
In Re Imogene R. Miller, 243 N. C. 509, 91 S. E. 2d 241	26
Maeztu v. Brownell, 132 F. Supp. 751	25
Mills v. Mississippi Employment Security Commission (Miss.) 89 Sou. 2d 727	15, 20
Swenson v. Michigan Employment Security Commission, 340 Mich. 430, 65 N. W. 2d 709	26, 27
Tary v. Board of Review, Bureau of Employment Compensation, 161 O. S. 251, 119 N. E. 2d 56	26
In Re Vacontios' Petition, 155 F. Supp. 427	25

Constitution of the United States — Page

Article I, Section 8 . . . . . 4, 22

Statutes and Regulations

Title 46, District of Columbia Code, 1951 Edition
(District of Columbia Unemployment Compensation Act)

Section 309 (Section 9 of the Act) 4

Section 310(a) (Section 10(a) of the Act) 2, 5, 13, 28

Section 310(c) (Section 10(c) of the Act) 5

Section 310(d) (Section 10(d) of the Act) . 3, 4, 6, 11, 13, 14, 18, 21, 22, 25, 26

Section 312(a) (Section 12(a) of the Act) 6, 17

Rules and Regulations Relating to Employees

Regulation III-A 6, 18, 19

Regulation III-C 8, 19

Rules and Regulations Relating to Employers

Regulation VIII-H 3, 9

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APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE
DISTRICT UNEMPLOYMENT COMPENSATION BOARD

PRELIMINARY STATEMENT

These cases were consolidated for the purpose of filing briefs and joint appendix and for hearing by order of this Court entered March 19, 1958.

COUNTER - STATEMENT OF THE CASE

Appellant, Ida H. Ecke, hereinafter referred to for convenience as Ecke, was employed by the Appellant, AEM, Inc., doing business as S. Groome Eareckson, a rug repair and servicing company, hereinafter referred to for convenience as Eareckson, as a seamstress, by the hour and on a call basis (J. A. 18). On or about May 30, 1955, Ecke was laid off because Eareckson did not have sufficient work. Shortly thereafter, Ecke was called back to work by Eareckson (J. A. 19). In the meantime, on June 9, 1955, Ecke filed a claim for unemployment with the Appellee, the District Unemployment Compensation Board, hereinafter referred to for convenience as the Board (J. A. 26). On June 16, 1955, Eareckson announced to all of its employees, including Ecke, that it would commence to operate an open shop but that the conditions of employment would be the same as they had been in the past and that all of its employees were free to remain in their various jobs or to leave as each might elect (J. A. 16, 17, 19, 23). Ecke voluntarily quit work with Eareckson and commenced refiling claims for unemployment with the Board (J. A. 19, 21, 22, 27). A claims deputy of the Board ruled that Ecke voluntarily left her most recent employment without good cause and disqualified her from receiving benefits from June 12, 1955, through July 16, 1955, and reduced her entitlement to benefits in the current benefit year by the sum of $150.00 (J. A. 49). This action was taken under Title 46, Section 310(a) of the District of Columbia Code (Section 10(a) of the District of Columbia Unemployment Compensation Act, hereinafter referred to as the Act).

From the decision allowing benefits subject to the above disqualification, both Eareckson and Ecke appealed (J. A. 15). The Appeals Examiner of the Board modified the decision of the deputy and ruled that Ecke was not available for work from the date of her original claim until August 5, 1955, and thus not eligible for benefits during that period but made no decision on Ecke's voluntary leaving. From this decision, Ecke appealed to the Board. The decision was set aside and the case was remanded by the Board to the Appeals Examiner to take additional testimony (J. A. 49). An additional hearing was held by the Appeals Examiner and the decision was rendered that Ecke was not subject to a disqualification for voluntarily quitting her most recent employer without good cause because of the provisions of Title 46, Section 310(d)(3) of the District of Columbia Code (Section 10(d)(3) of the Act). The Appeals Examiner also ruled that Ecke was not available for work from the date of her original claim until August 5, 1955, because she had not actively sought work and was ineligible during that period. Both Ecke and Eareckson appealed to the Board, Ecke claiming that she had actively sought employment and Eareckson claiming that her leaving Eareckson's employment was voluntary under Title 46, Section 310 of the District of Columbia Code (Section 10 of the Act) and that she should be disqualified from receiving unemployment compensation. Eareckson contended also that at all times it had a job open for Ecke which had been offered her on numerous occasions, although there is no showing in the record that it was offered in accordance with Regulation VIII-H of the Rules and Regulations Relating to Employers promulgated by the Board.

The Board (Page 49 et. seq. J. A.) rendered its decision on the two appeals to the effect that Ecke did not come under the provisions of Title 46, Section 310(d)(3) of the District of Columbia Code (Section 10(d)(3) of the Act) and disqualified Ecke from receiving benefits from June 12, 1955, through July 16, 1955, and reduced her potential benefits rights in the amount of $150.00. This action in effect reinstated the claim deputy's action when he ruled that Ecke had voluntarily quit without good cause. The Board ruled that Ecke was available for work and eligible for benefits after July 16, 1955, because she had exercised due diligence in seeking employment. There followed a suit in the United States District Court for the District of Columbia by Ecke and a cross-claim by Eareckson in the nature of cross appeals (J. A. 1,3). On motion for summary judgment by the Appellee, the suit and cross-claim were dismissed (J. A. 7,13). Ecke and Eareckson now appeal.

CONSTITUTION, STATUTES AND REGULATIONS INVOLVED

Constitution of the United States

Article I, Section 8:

> "The Congress shall have Power***
> To exercise exclusive Legislation in
> all Cases whatsoever, over such District
> (not exceeding ten Miles square) as may,
> by Cession of particular States, and the
> Acceptance of Congress, become the Seat
> of the Government of the United States***".

District of Columbia Code, 1951 Edition - Title 46

Section 309 (Section 9 of the Act):

"An unemployed individual shall be eligible to receive benefits with respect to any week only if it has been found by the Board--

(a) that he has made a claim for benefits with respect to such week in accordance with such regulations as the Board may prescribe;

? b

******

(c) that he is physically able to work;

(d) that he is available for work and has registered and inquired for work at the employment office designated by the Board, with such frequency and in such manner as the Board may by regulation prescribe:***".

Section 310(a) (Section 10(a) of the Act):

"An individual who has left his most recent work voluntarily without good cause, as determined by the Board under regulations prescribed by it, shall not be eligible for benefits with respect to the week in which such leaving occurred and with respect to not less than four nor more than nine consecutive weeks of unemployment which immediately follow such week, as determined by the Board in such case according to the seriousness of the case. In addition such individual's total benefit amount shall be reduced in a sum equal to the number of weeks of disqualification multiplied by the weekly benefit amount."

Section 310(c) (Section 10(c) of the Act):

"If an individual otherwise eligible for benefits fails, without good cause as determined by the Board under regulations prescribed by it, either to apply for new work found by the Board to be suitable when notified by any employment office or to accept any suitable work when offered to him by any employment office, his union hiring hall, or any employer direct, he shall not be eligible for benefits with respect to the week in

which such failure occurred and with respect to not less than four nor more than nine consecutive weeks of unemployment which immediately follow such week, as determined by the Board in such case according to the seriousness of the refusal. In addition such individual's total benefit amount shall be reduced in a sum equal to the number of weeks of disqualification multiplied by the weekly benefit amount. In determining whether or not work is suitable within the meaning of this subsection the Board shall consider (1) the physical fitness and prior training, experience and earnings of the individual, (2) the distance of the place of work from the individual's place of residence, and (3) the risk involved as to health, safety, or morals."

Section 310(d) (Section 10(d) of the Act):

"Benefits shall not be denied to any otherwise eligible individual for refusing to accept new work under any of the following conditions: (1) If the position offered is vacant due directly to a strike, lock-out, or other labor dispute; (2) if the wages, earnings, hours, or other conditions of the work offered are less favorable to the individual than those prevailing for similar work in the locality; (3) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization."

Section 312(a) (Section 12(a) of the Act):

" * * * * *

In any appeal under this section the findings of the Board, or of the examiner or appeal tribunal, as the case may be, as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of said court shall be confined to questions of law:

* * * * *."

Rules and Regulations Relating to Employees In Accordance With The District of Columbia Unemployment Compensation Act.

Regulation III-A Voluntary Leaving Without Good Cause

"In determining whether the leaving is such as to disqualify the individual for benefits for the time prescribed, it must appear that the leaving on his part was (1) voluntary in fact, within the ordinary meaning of that term, and (2) without good cause, in the light of all such facts, conditions, and circumstances as are relevant to the particular case. Ordinarily a leaving will be presumed to be involuntary on the part of the claimant unless the facts clearly indicate otherwise. Where it appears that the leaving was voluntary, the burden of proof shall be on the claimant to establish good cause. What is good cause for leaving will accordingly depend upon the facts in each case and will not be confined to causes connected solely with the employment itself. The test will be--what would the reasonable and prudent individual in the labor market do in like circumstances. (Approved October 26, 1954, effective January 1, 1955.)

For example, the following in general, would not be considered good cause for leaving:

1. Refusal to obey reasonable rules and regulations
2. Minor reduction in wages
3. Transfer from one type of work to another which is reasonable and necessary
4. Marriage or divorce, resulting in a change of residence
5. General dissatisfaction with work
6. Vague prospects of other work deemed by the claimant more desirable.

If the Board finds that a claimant has left his most recent work without good cause, it will proceed to fix such a period of disqualification and resultant cancellation of potential benefit rights (within the limitation of the Act) as it deems warranted by the character and circumstances of the voluntary separation with due consideration to the claimant's past record of employment, duration of most recent employment, and other mitigating circumstances.

(Approved October 26, 1954, effective January 1, 1955.)."

Regulation III-C Failure to Apply for or Accept Suitable Work

"The Board will determine what is or is not good cause for failure of an otherwise eligible individual to apply for or accept suitable work. It must first be determined that the work is suitable in a particular case in accordance with the general standards prescribed. However, the Board in considering such a request may adopt such further or additional standards as it believes will insure a reasonable determination thereof. The term 'work' as here used applies in its broad and general sense and includes services performed in both covered and exempt employment. Likewise, the term 'wages' as used in this subsection applies to all remuneration for services performed either in employment as defined in the Act and these regulations or otherwise. In determining whether or not the failure was for good cause, the Board will consider all the facts, conditions and circumstances relevant to the issue.

For example, the following generally would not constitute good cause for failure either to apply for or accept new work when offered:

1. Slight difference in wages or hours of work
2. Difference in locality where transportation facilities are adequate and economical
3. Temporary physical disability which does not substantially interfere with ability to work
4. General or personal objections to employer or to fellow workers

If the Board finds that the claimant has failed without good cause to either apply for new work or to accept any suitable work offered to him by any employment office, his union hiring hall, or by any employer direct, it will proceed to fix such a period of disqualification and resultant cancellation of potential benefit rights (within the limitation of the Act) as it deems warranted by the character of his failure to accept an offer of employment and the degree of

reasonableness of his refusal to seek or accept suitable employment with due consideration to the claimant's past record with the Board, length of unemployment, and such other circumstances as might be applicable. (Approved October 26, 1954, effective January 1, 1955.)"

Rules and Regulations Relating to Employers Promulgated Under Authority of the District of Columbia Unemployment Compensation Act.

Regulation VIII-H Referrals by Employers

"Pursuant to the provisions of section 10(c) of the Act, no offers of work will be made through the Board, but all offers of work shall be made through an employment office as defined in section 1(m) of the Act, his union hiring hall or by employers directly to prospective employees. Except as hereinafter provided, all offers of work made directly by an employer shall set out the nature of the work offered, the probable wages and hours per week, the shift or daily hours of proposed employment, the expected duration of employment, union requirements, if any, the time and place the claimant should report, and the name of the person to whom he is to report. An employer, offering the same work, under the same conditions to a former employee, as a former employee was performing at the time of separation, need not specify the conditions of employment set out above if the offer is made within 60 days after the date of separation.

re offers

No disqualification will be imposed for job offers made by telephone nor will disqualifications be imposed by reason of the failure of a claimant without good cause to accept a direct offer of available and suitable work unless a job opening actually exists and unless the employer notifies the Board, within 48 hours, exclusive of Sundays and holidays, on the form supplied by the Board for that purpose, of such refusal and at the same time mails a copy of such notice to the claimant. If for any reason the appropriate forms are not available to the employer, he may conform with the requirements of this regulation by submitting,

re informing b

in writing, to the Board and a copy to the claimant, the information requested by the form.

All pertinent information requested on the form shall be supplied and in the event the job offer was made in writing, a copy of such offer shall be attached to the form or writing furnished to the Board.

For the purpose of this Regulation, should a claimant fail to appear within three days, exclusive of Sundays and holidays, from the date of the mailing of the job offer, he shall be presumed at that time to have refused the job offer. This presumption may be overcome by a showing that the job offer was not received by him.

In determining whether or not work is suitable, the Board shall use the same tests for suitable work as used in other cases especially considering the provisions of Subsections 10(c) and (d) of the Act and the provisions of Regulation III C. of the Rules and Regulations Relating to Employees. (Approved October 26, 1954, effective January 1, 1955.)"

SUMMARY OF THE ARGUMENT

I

The facts show that Ecke voluntarily left her employment with Eareckson because he had declared that in the future he was going to operate an open rather than a union shop. Ecke left because she feared disciplinary action by her union if she worked in an open shop. The Board properly assessed Ecke the minimum disqualification allowed by law for voluntary leaving without good cause. In making its decision the Board properly followed the decision of the highest

courts of four states in an analogous situation. These courts held that a union member did not have good cause for refusing otherwise suitable work when the sole reason for such refusal was that the union member feared disciplinary action if he worked in an open shop.

II

The Unemployment Compensation Act is not class legislation but was enacted for the benefit of the general public and not for union members as a class. In making decisions under the Act and its Regulations the Board must take uniform decisions for all individuals without regard to their affiliation with a labor organization.

III

The decision of the Board is supported by substantial testimony and the Board did not act arbitrarily or abuse its discretion. The court's jurisdiction in such cases is confined to questions of law and it can not be said as a matter of law that the Board's decision is in error. Its decision is in an area where the Board has discretion to exercise its sound judgment and as there has been no abuse of discretion, the decision of the Board should stand.

IV

Section 10(d) of the Act is not applicable as this is a case of voluntary leaving and the section applies solely to offers of new work. In addition, the plain meaning of the section is that the condition requiring the individual to resign from a labor organization must be imposed by the job itself. An indirect result of a union rule does not constitute a condition of the job. A different construction of this section

might result in its being declared unconstitutional and the courts favor a construction which would result in the constitutionality of a law rather than one that would result in its unconstitutionality. Where the wording of a statute is clear and unambiguous and where it does not lead to absurd results, resort to the legislative history should not be necessary. In addition, the legislative history of the provision in question is not clear.

V

The cases cited by Ecke are not in point, most of them having no analogy at all but contain generalities that do not fit the case. The only cases having any similarity are three cases involving the availability of Seventh Day Adventists for work when they refuse to work on their Sabbath. These cases involve the proposition of whether or not working on their Sabbath would be damaging to their morals, when it violates a tenet of their faith. This is much different than an individual ignoring a rule of an organization which was formed for his financial well-being and not for his moral or spiritual well-being.

VI

The Act was not designed to freeze an individual permanently on a job with an employer and one leaving a job because of a reason not deemed good cause by the Board but for a reason which was not whimsical should not be penalized more than once for the same decision. Ecke's refusal to go back to work with this employer amounts to the same decision as was made when Ecke left the employment. Accordingly, it is not believed that it was the intent of Congress to penalize Ecke more than once for the same offense.

ARGUMENT

I

Ecke Voluntarily Quit Without Good Cause

The principal question before this Court is whether Eareckson's declaring his shop to be an open one when it had previously been a union shop was good cause for Ecke quitting when all of the other conditions of employment remained the same.

The Board decided the case under the provisions of Title 46, Section 310(a) of the District of Columbia Code (Section 10(a) of the Act) and not under the provisions of Title 46, Section 310(d)(3) of the District of Columbia Code (Section 10(d)(3) of the Act) as intimated by Ecke in her brief. The Board found that Ecke had quit her employment and disqualified her for a period of five weeks and cancelled her potential benefit rights in the amount of $150.00. Title 46, Section 310(d)(3) of the District of Columbia Code (Section 10(d)(3) of the Act) was considered by the Board because Ecke contended that she was entitled to the protection of its provisions and because the Appeals Examiner had so found. Accordingly, it was necessary for the Board to rule on whether the said section applied. This Board found that the section was not applicable. The Board then made its finding under Title 46, Section 310(a) of the District of Columbia Code (Section 10(a) of the Act). This section provides for disqualification while the other section contains no disqualification provisions but is a safeguard to employees in certain specified instances.

The precise question before this Court has not reached the Courts

in any state in a reported decision. An analogous situation has reached the Courts in five states and in every instance has similarly been decided by the highest Court of each state. This question is whether or not a union member may refuse a job solely because an open shop is involved and the union member may suffer disciplinary action including expulsion by his union. All five state laws contain a provision identical or similar to Title 46, Section 310(d) of the District of Columbia Code (Section 10(d) of the Act). In each instance the claimant involved asserted the protection of the said section and in each instance the Court ruled against the claimant. In three of these cases the Courts ruled that non-union work was suitable work and the claimant did not have good cause for refusing the work and was accordingly subject to a disqualification. These cases are as follows:

Chambers v. Owens-Ames Kimball Co.
146 O. S. 559; 67 N. E. 2d 439

Bigger v. Unemployment Comp. Comm.
43 Del. 553; 53 A 2d 761

Barclay-White Co. v. Unemployment Comp. Bd. of Rev., 356 Pa. 43; 50 A 2d 336, Certiorari Denied 332 U. S. 761

In Missouri the lower Court decided that the claimant was subject to a disqualification for a said number of weeks for refusing suitable employment and the Supreme Court set this disqualification aside and ruled that the claimant was not available for work and not eligible for benefits for a much longer period of time. As the Missouri Law did not couple a cancellation of potential benefit rights with its disqualification it was not necessary for the Supreme Court to rule on the disqualification itself and

it in effect merged the disqualification into a longer ruling of ineligibility. See Donnelly Garment Company v. Keitel, 354 Mo. 1138, 193 S. W. (2d) 577.

In Mills v. Mississippi Employment Security Commission, (Miss.) 89 Sou. 2d 727, the final and most recent case the Supreme Court of Mississippi ruled that a union member who refused to accept any non-union work which did not pay the union scale was not available for work.

It would seem that the above cases are as close to the point involved in the instant case as possible. It further appears that, if an unemployed individual does not have good cause for refusing otherwise suitable work solely because it is a non-union job, an employed individual would not have good cause for quitting employment because his employer declared an open shop. In fact, the obligation to remain on the job is greater than the obligation to accept new employment.

II

Unemployment Compensation Act Not Class Legislation

The Board agrees with Ecke that, in construing the Unemployment Compensation Act, consideration must be given to the purpose of the Act. However, the Board does not agree with Ecke as to the original purpose of the Act. Congress did not intend the Act to be for the primary benefit of union members. If indeed such was the intention of Congress the Act would have been unconstitutional. In upholding the constitutionality of the Alabama Unemployment Compensation Act, the Supreme Court held in Carmichael v. Southern Coal & Coke Company, 301 U. S. 495; 57 S. Ct. 868; 81 L. E. 1245, that in order for the Act to be constitutional

it must have been enacted for a public purpose. An enactment of legislation for a class as limited as union members would not meet such requirements. The Act was passed in 1935 at a time when the country was in the throes of a general depression and unemployment was high. The purpose was to assist the entire economy and not just to afford unemployment compensation for union members. The idea was to institute a system insuring as many individuals as possible against involuntary unemployment. This is to compensate for unemployment that was not due to the fault of the individual. When such an individual became unemployed, he was to be paid insurance for a period of time. This money was to be used to keep up his spending power. Thus the system would feed money into the economy and the money would be turned over a number of times and prevent future depressions.

An individual who resigns a job because of a rule of an organization of which she is a member cannot be said to be involuntarily unemployed. Such individual would be charged with being a party to any rule of any organization in which she was a member. In other words, the rules of a union are initially established by the membership. Any member operating under such rules who leaves employment because of one of them must be said to ratify the rule by her action.

It is evident that the Supreme Court of Pennsylvania was of the opinion that the Pennsylvania Unemployment Compensation Act was passed for the benefit of the entire public and not a limited class such as unions or other organizations when it said in Barclay-White Company, supra at Page 341:

> "The public policy of the Commonwealth does encourage membership in labor organizations but retention of membership therein is not a surrender to circumstances of the kind and quality which will turn voluntary unemployment into involuntary unemployment. It would do great violence to the clear and unequivocal wording of the statute to hold that a labor or any other organization can control payments of unemployment benefits to its members by merely forbidding them to work at wages less than those set by it, or with certain persons, or at certain places or under certain conditions. If eligibility under such conditions is to be added to the Act, that must be done by the Legislature, and not the Courts."

III

Ruling Of The Board Is Correct

The Board, in its decision of January 24, 1956, (J. A. 50), found the following facts:

> "A careful study of the testimony discloses that the claimant left the service of this employer on June 16, 1955, after its President had announced that it would no longer operate a union shop but would operate an open shop. The claimant was free to remain with the employer at this time but left rather than take a job which might subject her to disciplinary action by her union."

Most of the above facts are admitted by Ecke in the last paragraph on Page 2 of her brief. In addition these facts are supported by substantial evidence (J. A. 16--23). Accordingly they are binding upon the Court and the sole matters to be determined are questions of law. See Title 46, Section 312(a) of the District of Columbia Code. (Section 12(a) of the Act).

> "*** In any appeal under this Section the findings of the Board, or of the examiner or appeal tribunal, as the case may be, as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of said court shall be confined to questions of law ***".

Ecke has attempted to distort Regulation III-A. As has been shown in the preceding section of the argument, this is not class legislation, and regulations must be construed in the same manner for all claimants coming under their jurisdiction. The Board must determine what the reasonable and prudent individual would do in like circumstances and not what the reasonable and prudent union individual would do.

In assessing disqualifications the Board has a reasonable amount of latitude and discretion. In this case Ecke was disqualified for the minimum period allowed by law for refusing to remain on a job solely because she was a union member and did not care to work in an open shop. The highest courts of three states have ruled that union rules preventing its members from working in open shops did not constitute good cause for union members to refuse work in open shops. The cases are Barclay-White Co., Chambers, and Bigger, supra. It should be noted that the Supreme Court of the United States refused certiorari in the Barclay-White Co. case.

An exhaustive search of the record fails to list any of the numerous benefits that Ecke claims that she would have lost by working in the open shop. The record merely indicates that she would have lost her union membership if discovered working on the job.

The facts have been admitted by Ecke and are supported by substantial evidence in the record. It has been shown that the Board was not arbitrary nor did it abuse its discretion, and there would appear to be no remaining question of law subject to review by this Court.

IV

Section 310(d) Is Not Applicable

Neither the provisions of Subsection 2 nor of Subsection 3 of Title 46, Section 310(d) of the District of Columbia Code (Section 10(d) of the Act) are applicable in this case for the following reasons:

A

The said section applies solely to offers of new work and was not designed to protect individuals who voluntarily leave their employment as was done by Ecke.

B

Subsection 2 does not apply because the testimony of Eareckson indicated that at the time Ecke left there was no change in the wages (J. A. 18) and the testimony of the union agent Blackburn indicated there had been merely a slight change in the union scale on May 9 from $1.67 to $1.75 an hour (J. A. 25-26).

Under the Regulations promulgated by the Board a slight change in wages would not be considered. Regulation III-A in connection with voluntary leaving provides in part as follows:

> " *** For example, the following in general, would not be considered good cause for leaving:
> * * * * *
> (2) Minor reduction in wages
> * * * * *."

Regulation III-C which covers failure to apply for or accept suitable work provides in part as follows:

> " *** For example, the following generally would not constitute good cause for failure either to apply for or accept new work when offered:
> (1) Slight difference in wages or hours of work.
> * * * * *."

In addition the Supreme Courts of Pennsylvania, Delaware and Mississippi in the Barclay-White, Bigger, and Mills cases, supra, ruled that differences in pay larger than the eight cents an hour involved in this case did not entitle the claimants to the protection of provisions in the respective laws similar to Subsection 2.

C

A careful reading of Subsection 3 indicates that it was designed to protect individuals from conditions imposed by the job itself and not to protect them from indirect results because of rules and by-laws of unions which are subject to change from time to time at the whim of the members.

The refusal of a union member to accept work because it was in an open shop and would subject him to possible disciplinary action by his union has reached the courts in only five states. In all of the states the cases were finally decided by the highest court. In four of the states the courts held that provisions of law identical to Subsection 3 did not apply. These courts held that conditions of the job itself must cause the individual to refrain from joining or must cause the individual to resign from the union in order for the section to be applicable. These four courts uniformly held that any condition set forth by the union which prevented an individual from accepting a job did not fall within the intent of the legislature. These cases are the Chambers, Bigger, Barclay-White Co., and Mills cases supra. In Barclay-White the court said at Page 339:

> "Where, however, the offer of the employer is unconditional, it was not intended that the

> employee be eligible for compensation where he refuses the proferred position merely because of a condition imposed on him by others. If it had been the intent of the legislature to cover a situation where the employee would be expelled by his union, it would have used language connoting both expulsion and resignation."

The same question arose in Missouri and was decided in the Donnelly Garment Company case, supra. The lower court ruled that the individual was subject to disqualification for a definite number of weeks for refusing work in an open shop. On appeal to the Supreme Court, the disqualification was merged into a ruling that the claimant was not available for work and not eligible for benefits for a period of time much longer than the disqualification. The Missouri law did not contain a cancellation of benefits provision in connection with its disqualification, therefore, the question of disqualification became moot.

D

In construing legislation, it is the general policy of Courts to favor a construction that would result in the constitutionality of a law. If Section 10(d) were construed to include conditions established by the union, it would be a delegation of legislative authority to the unions because by establishing conditions from time to time the unions would be able in effect to amend the District of Columbia Unemployment Compensation Act.

In the Barclay-White Co. case, supra, the court stated, at Page 341:

> " 'To hold otherwise is the equivalent of saying that a union may adopt its own definition of suitable work and determine,

> by rule and by-law, what does and what does not constitute good cause for refusing referred employment. The legislature has not delegated such authority and is without power to do so. Locke's appeal, 72 Pa. 491, 13 Am. Rep. 716' ".

Inasmuch as exclusive legislation over the District of Columbia is vested in Congress by Article I, Section 8 of the Constitution of the United States, such a construction would result in the unconstitutionality of Section 10(d) because it would be an improper delegation of legislative authority by Congress.

E

There is no need in the instant case to resort to the hearings before Congress to ascertain the legislative intent because the interpretation of Subsection 3 is clear and unambiguous and is subject to only one meaning. The courts have uniformly held in such cases not to go beyond the law itself. The United States Supreme Court said in Caminetti v. United States, 242 U. S. 470, 37 S. Ct. 192, 61 L. E. 442, at Page 485:

> "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms. Lake County v. Rollins, 130 U. S. 662, 670, 671; Bate Refrigerating Company v. Sulzberger, 157 U. S. 1, 33; United States v. Lexington Mill and Elevator Co., 232 U. S. 399, 409; United States v. Bank, 234 U. S. 245, 258.
>
> Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion. Hamilton v. Rathborne, 175 U. S. 414, 421."

And again at Page 490:

> "Reports to Congress accompanying the introduction of proposed laws may aid the courts in reaching the true meaning of the legislature in cases of doubtful interpretation, Blake v. National Banks, 23 Wall. 307,319; Bate Refrigerating Co. v. Sulzberger, 157 U. S. 1,42; Chesapeake and Potomac Telephone Co. v. Manning, 186 U. S. 238,246; Binns v. United States, 194 U. S. 486,495. But as we have already said, and it has been so often affirmed as to become a recognized rule, when words are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by considerations drawn from titles or designating names or reports accompanying their introduction, or from any extraneous source. In other words, the language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent. See Mackenzie v. Hare, 239 U. S. 299,308."

F

Finally, an examination of the legislative history involved is confusing and does not lead to any clear-cut interpretation on this point. Referring to the hearings on the proposed Economic Security Act, H. R. 4120 before the House Committee on Ways and Means in the 74th Congress, First Session, referred to by Ecke in her brief it would appear that M. B. Folsom the present Secretary of Health, Education and Welfare, was a member of the President's Advisory Council and among other things worked on the unemployment compensation features of the Bill. (See Page 989.) Mr. Folsom testified at length and at the end of his oral testimony filed a written statement. Often, matters may be misstated orally but this is not likely to happen in a prepared written statement. The following paragraph appears on Page 1005 of the above report:

> "Referring to section 602, subparagraph (d), which reads in part as follows: 'Compensation is not

> denied in such States to otherwise eligible employees for refusing to accept new work under any of the following conditions*** (3) if acceptance of such employment would either require the employee to join a company union or would interfere with his joining or retaining membership in any bona fide labor organization.' The Advisory Council recommended a different wording for this condition which seemed fair and impartial and reads as follows: 'If acceptance of such employment would effect the applicant's right to accept or refrain from accepting or retaining membership in or observance of the rules of an organization of employees.' We recommend this change be made."

From the above paragraph it would appear that the original draft contained legislation more favorable to union members than that which was actually passed. Furthermore the above quotation indicates that the Advisory Council recommended a wording even more favorable to union members than that of the original draft. It seems most significant that the provision actually passed was less favorable than the two set out above.

V

Cases Cited By Ecke Not In Point

A careful reading and analysis of the cases cited by Ecke in her brief discloses that they are not in direct point. No attempt will be made to discuss or analyze the authorities listed by Ecke in the supplemental appendix to her brief, because all of these authorities involve administrative decisions and not cases decided by the courts. There are numerous administrative decisions in the various states on this point holding both pro and con. In some instances the administrative decisions in a single state are in conflict with one another. It is significant that when an almost

identical issue reached the courts in five states it was decided by the highest court of the state adversely to the union position. Furthermore, in one of the cases certiorari was denied by the United States Supreme Court.

The Board agrees with the decision of the court in Maeztu v. Brownell, 132 F. Supp. 751, ruling that decisions of other Federal jurisdictions and inferentially decisions of other state courts are not binding upon this court. Although the decisions of the highest courts of five states are not controlling upon this court they certainly are persuasive and should be given great weight because of their unanimity and because certiorari to the Supreme Court of the United States was denied in one of them.

In citing Cabell v. Markham, 148 F. 2d 737, and In Re Vacontios' Petition, 155 F. Supp. 427, on the point that literalism must yield to the legislative purpose, Ecke has misconstrued the legislative purpose. These cases merely hold that when literal words of the statute lead to absurd results, resort may be had to the legislative purpose. In Caminetti v. United States, supra, the general rule is that unless absurd results are reached the plain words of the statute must be followed. It must be remembered that in the drafting of all of the unemployment compensation acts the various legislatures have been faced with the prospect that on one side is capital and on the other side labor and the laws have been designed with the idea that neither party may use the unemployment compensation act as a vehicle to further its interests to the detriment of the other party. Thus, Section 310(d)(3)

of the District of Columbia Code (Section 10(d)(3) of the Act) was intended to defend union members against unscrupulous employers but was not forged as a weapon for the union to use against an employer. As an illustration that the act was designed to be neutral in aiding neither capital nor labor, Subsection (f) of the above section denies individuals unemployment benefits when they are unemployed because of a labor dispute in which they are participating or directly interested.

The only cases cited by Ecke that appear to be in any way analogous to the instant case are Tary v. Board of Review, Bureau of Employment Compensation, 161 O. S. 251, 119 N. E. 2d 56; Swenson v. Michigan Employment Security Commission, 340 Mich. 430, 65 N. W. 2d 709; and In Re Imogene R. Miller, 243 N. C. 509, 91 S. E. 2d 241. The above cases all involve the availability of Seventh Day Adventists for work when they refuse to work from sundown on Friday to sundown on Saturday or involve whether or not members of the Seventh Day Adventists faith have good cause for leaving employment because they will not work from sundown on Friday until sundown on Saturday. These cases were decided under provisions similar to the following:

> "In determining whether or not work is suitable within the meaning of this subsection the Board shall consider
>
> * * * * *
>
> (3) the risk involved as to health, safety, or morals."

In analyzing the above cases we must keep in mind that the framers of the Constitution of the United States and of all the State Constitutions had it in their minds to give complete freedom of worship to every individual. The

First Amendment to the Constitution of the United States guarantees such rights. Although none of the above cases were decided on this exact constitutional ground it must have had persuasive effect upon the courts in determining what was injurious to the person's morals. Thus, it is seen that religions were accorded great protection by the framers of our Constitution and in construing what would be injurious to an individual's morals the tenets or belief of a religious faith have rightfully been accorded great weight by the courts. A religion is for the spiritual protection of its members and individuals breaking its rules may never in their own conscience absolve themselves from blame. There would appear to be a distinct difference in connection with the union member and union rules. Although, Ecke in her brief, has tried to build up membership in a union to the extent of a religion, there is a concrete difference. The union membership is for the betterment of the financial position of the member and the betterment of his working conditions in contrast to his spiritual well-being and accordingly the courts in the above cases properly ruled that it would be injurious to the individual's morals to violate a tenet of his religion. This was not the case when the union rule reached the court, although one of the courts ruled on both cases. In addition, Swenson v. Michigan Employment Security Commission, supra, turned on the grounds that Seventh Day Adventists did not remove themselves from the labor market by refusing to work during the period in question as in the area involved many of them worked during hours not meeting the disapproval of their faith.

THE FOREGOING PORTION OF THE ARGUMENT HAS BEEN DIRECTED ENTIRELY TOWARD THE APPELLANT, ECKE. THE REMAINDER OF THE ARGUMENT WILL BE DIRECTED TOWARD THE APPELLANT, EARECKSON.

VI

As To Eareckson

The primary purpose of the Act is to afford insurance to individuals who have lost their jobs through no fault of their own. The Act does afford benefits to individuals who have voluntarily left their work without good cause or who have been discharged for misconduct. These benefits are only paid after a period of disqualification which postpones the receipt of benefits and reduces the maximum amount of benefits that can be drawn by the individual during his benefit year. The disqualification for voluntary quitting without good cause is contained in Section 310(a) of Title 46 of the District of Columbia Code (Section 10(a) of the Act) and the disqualification for a misconduct discharge is contained in Subsection (b) of the same section. Accordingly, it definitely appears that it was the intent of Congress to award insurance or benefits to individuals who voluntarily left their employment without good cause after serving a period of disqualification.

It was not the intent of Congress to have the Act serve as a vehicle for freezing an individual's services with one employer for a period as long as that employer might desire.

In the instant case the Board did not find that Ecke had good cause for voluntarily leaving Eareckson and the Board assessed Ecke a disqualification of five weeks and cancelled her potential benefit rights to the amount of $150.

In the event a disqualification was to be assessed, this was the minimum permitted under the Act. Although the Board did not deem Ecke's reason for leaving good cause and thus relieve her of the disqualification, it did not consider her reason for leaving to be a frivolous or whimsical one. Now Eareckson, in effect, says that I have the job open for Ecke and she won't take it and consequently she should be subject to a continuing disqualification. The Board considered that, in effect, to penalize Ecke again and again during the benefit year for refusing to work for Eareckson would amount to a double or multiple penalty for what amounted to the same offense. Ecke was faced with possible disciplinary action from her union or the partial loss of her unemployment compensation benefits and she chose the latter for a reason which was good to her but not to the Board. To rule that Ecke was subject to a continuing disqualification each time she was faced with this choice during her benefit year would be, in effect, penalizing her several times for her same choice. This, in effect would freeze her employment with Eareckson indefinitely.

The Board took the position that it was the intent of Congress to penalize a claimant only once for what amounted to a single action. Inasmuch as Ecke made a diligent work search and sought employment with other employers, the Board properly found that after Ecke had served her period of disqualification with the Board she was available for work and entitled to benefits.

CONCLUSION

Inasmuch as the Act is not class legislation the Board's action in disqualifying the claimant for voluntary leaving without good cause was

proper and not arbitrary, taking into consideration all the pertinent parts of the Act and Regulations. Furthermore, its allowance of benefits to Ecke after she had served her disqualification period was correct in view of the fact that she demonstrated her attachment to the labor market by a diligent job search with employers other than Eareckson. For the foregoing reasons, it is respectfully submitted that the judgment of the lower court be affirmed in both appeals.

Respectfully submitted,

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